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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1946

TEXAS PACIFIC COAL & OIL COMPANY, *Petitioner*

vs.

R. G. CALCOTE ET AL., *Respondents*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, with Supporting Brief

---

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INDEX

Page

Petition for Certiorari

Jurisdictional Statement 2

Brief Statement of the Case 2- 6

Grounds of Jurisdiction and Reasons for Allowance of Writ of Certiorari 6-10

Prayer 11

Brief in Support of Petition for Certiorari

Questions Presented 14-18

Brief of Argument 19-63

I. *In reversing for lack of parties without determining whether plaintiffs' petition stated a cause of action, the Fifth Circuit held directly contrary to Bourdieu v. Pacific Western Oil Co., 299 U. S. 65, 81 L. Ed. 42, and Verde River Irrig. & Power Dist. v. Salt River Valley Water Users' Assn., 94 F. 2d 736, by the Ninth Circuit* 19-22

II. *Since subsequent to petitioner's qualification to do business in Mississippi plaintiffs ratified, confirmed and adopted pettioner's oil and gas lease by the conveyance of three-fourths of the royalty payable thereuder, which conveyances were binding not only on plaintiffs, but on such royalty grantees also, and on retrial the same judgment must again be entered, the Fifth Circuit in reversing conflicts not only with the Bourdieu case, but also Pugh v. McCormick, 14 Wall. 361, 373-4, 20 L. Ed. 789, 791, and Vagaszki v. Consolidation Coal Co., 225 F. 918, 921, by the Second Circuit* 22-27

INDEX—Continued

Page

III. *Since the judgment below confirmed the lease in which the royalty grantees were assigned three-fourths of the royalty, their rights could have been preserved by a provision in the judgment, and the Fifth Circuit, in reversing to have them made parties, is in conflict with Oxley v. Sweetland, 94 F. 2d 33, by the Fourth Circuit, and its own former decisions in Spring v. Ohio Oil Co., 108 F. 2d 560, and other cases* 28-32

IV. *Plaintiffs' Petition did not state a cause of action, because*

(1) Their allegations showed their contention that the lease was without consideration ~~and~~ had no merit 32-33

(2) Petitioners' title was not void, nor could grantors Calcotes avoid their grant because petitioner had not qualified to do business in Mississippi when the lease was executed. Such lease was an executed contract, and vested a determinable fee in the minerals which only the State of Mississippi (if anyone) could escheat 33-48

(3) Nor under Mississippi decisions did plaintiff's amendment filed in the Federal Court state any right to avoid their lease, which plainly covered the land in Adams County, ~~and~~ no fraud on part of petitioners' agent being alleged 48-54

V. *Under Mississippi statutes and decisions petitioner was entitled to confirm its title, and to cancel Calcotes' claims as clouds on its title, without joining the royalty owners, and the Fifth Circuit erred in disregarding, and not applying, such statutes and decisions* 54-62

INDEX—Continued

Page

Conclusion 62-63

Signature of Counsel 63

Appendix 64-83

Original Opinion of Fifth Circuit 64-75

Dissenting Opinion by Judge Hutcheson 76-78

Opinion on Rehearing 79-83

LIST OF AUTHORITIES

Alliance Trust Co. v. Armstrong, 185 Miss. 148, 186 So. 633 50

American Mills Co. v. American Surety Co., 260 U. S. 360, 67 L. Ed. 306 61

Big Cola Corp. v. World Bottling Co. (CCA DC), 134 F. 2d 718 61

Bourdieu v. Pacific Western Oil Co., 299 U. S. 65, 81 L. Ed. 42 ..... 6, 7, 14, 15, 20, 21, 26, 54

Caulk v. Burt, 112 Miss. 660, 73 So. 618 50

Chisum v. Hollis, 152 Miss. 772, 118 So. 713 ..... 2, 33, 42

Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 84 L. Ed. 196 61

Citizens Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684 ..... 35, 36, 40, 41, 45

Continental Jewelry Co. v. Joseph, 140 Miss. 582, 105 So. 639 50

31 C. J. S., Sec. 38, p. 216 26

Cummings v. Mid-States Oil Corp., 193 Miss. 675, 9 So. 2d 648 ..... 4, 8, 23

David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 56 L. Ed. 1177 ..... 46, 48

Day v. Davis, 64 Miss. 253, 8 So. 203 33

Dixon v. Milling, 102 Miss. 449, 59 So. 804, 43 L. R. A. (N. S.) 916 33

LIST OF AUTHORITIES—Continued

Page

Federal Land Bank v. Cooper, 190 Miss. 490, 200 So. 729 ..... 42, 44
Federal Rules of Civil Procedure, Rules 13(b), 13(i) and 42(b) 18, 55, 60, 61
Fornea v. Goodyear Yellow Pine Co., 181 Miss. 50, 178 So. 914 50
Fritts v. Palmer, 132 U. S. 282, 33 L. Ed. 317 ..... 46, 48

Garber v. Hauser, 76 Okla. 292, 185 P. 436 33
Glasscock v. Farmers Royalty Holdings Co. (CCA 5 Tex.), 152 F. 2d 537 4
Goldsmith v. Gilliland, 24 F. 154 60
Greene v. White, 137 Tex. 361, 153 S. W. 2d 575 ..... 4, 8, 25
Gridley v. Wynant, 64 U. S. 500, 16 L. Ed. 411 60
Griefield v. Gibralter F. & M. Ins. Co., ... Miss. ....., 24 So. 2d 356 45
Grissom v. Anderson, 125 Tex. 26, 79 S. W. 2d 619 ..... 4, 8, 24
Gunter v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720 50

Home Ins. Co. v. Scott (CCA 6), 46 F. 2d 10 ..... 9, 16
Home Ins. Co. v. Trotter (CCA 8 Mo.), 130 F. 2d 800 61
Home Mut. B. & L. Assn. v. Leonard, 77 Miss. 39, 25 So. 351 38
Humble O. & R. Co. v. Davis, 282 S. W. 930, 296 S. W. 285 ..... 4, 8, 24
Humble O. & R. Co. v. Clark, 126 Tex. 262, 87 S. W. 2d 471 24

Jones v. Bevier (Tex. Civ. App.), 59 S. W. 2d 945, writ refused 33

Koenig v. Calcote, ... Miss. ....., 25 So. 2d 763 ..... 2, 17, 33, 42, 50, 52
Krentler-Arnold Hinge Last Co. v. Leman, 13 F. 2d 796, 284 U. S. 448, 76 L. Ed. 389 61

Lesnik v. Public Industrial Corp. (CCA 2 N.Y.), 144 F. 2d 968 61
Lion Mfg. Corp. v. Chicago F. S. Co. (CCA 7 Ill.), 106 F. 2d 930 61

LIST OF AUTHORITIES—Continued

Page

Lloyd's Estate v. Mullen Tractor & Equip. Co., 192 Miss. 62, 4 So. 2d 282 ..... 2, 33, 42
Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646 39
Longmire v. Marsh, 124 Miss. 77, 86 So. 753 33
Lupton's Sons (David) v. Automobile Club of America, 225 U. S. 489, 56 L. Ed. 1177 ..... 46, 48

Meder v. Superior Oil Co., 151 Miss. 814, 119 So. 318 33
Middleton v. Georgetown Merc. Co., 117 Miss. 134, 77 So. 956 40
1 Miss. Code Ann. 1942, Sec. 1120, p. 1025 ..... 38, 85
2 Miss. Code Ann. 1942, Sec. 1314, p. 138 ..... 56, 57, 60
2 Miss. Code Ann. 1942, Sec. 1315 ..... 56, 60
2 Miss. Code Ann. 1942, Sec. 1323 ..... 4, 10, 18, 54, 56, 57., 58
2 Miss. Code Ann. 1942, Sec. 1324 ..... 4, 10, 18, 55, 56, 59, 60
4 Miss. Code Ann. 1942, Sec. 5343, p. 415 34
Mississippi Code 1930, Sec. 4169 43
McCubbins v. Morgan, ... Miss. ....., 23 So. 2d 926 ..... 50, 52
McLean v. York Oil Co. (CCA 5 Tex.), 138 F. 2d 804 55
McLendon v. McGee, ... Miss. ....., 198 So. 725 ..... 10, 60

Newell Contracting Co. v. State Hwy. Com., 195 Miss. 395, 15 So. 2d 700 45

Oxley v. Sweetland (CCA 4), 94 F. 2d 33 ..... 9, 15, 28, 30

Pace v. State, 191 Miss. 780, 4 So. 2d 270 45
Peeples v. Enochs, 170 Miss. 472, 153 So. 796 42
Pierce Pet. Corp. v. Empire G. & F. Co. (CCA 5 Tex.), 17 F. 2d 758 61
Pugh v. McCormick, 14 Wall. 361, 373-4, 20 L. Ed. 789, 791 ..... 7, 15, 22, 27

Quitman Co. v. Stritze, 70 Miss. 320, 13 So. 36 41

Rich v. Braxton, 158 U. S. 375, 405, 39 L. Ed. 1022, 1032 61
Rules 13(b), 13(i) and 42(b) Federal Rules of Civil Procedure 18, 55, 60, 61

LIST OF AUTHORITIES—Continued

Page

Seeley v. Cornell (CCA 5 Tex.), 74 F. 2d 353 ..... 9, 15, 28, 30
Seeley v. Cornell (CCA 5 Tex.), 90 F. 2d 562 ..... 9, 15, 28, 30
Seeley v. Hunt (CCA 5 Tex.), 109 F. 2d 595 ..... 9, 15, 28, 30
Silverman v. Emerson, 257 S. W. 612 33
Simkins Federal Practice (Rev. Ed.), Sec. 708-714, pp. 669-672 61
Smith v. Jassen, 105 Miss. 227, 62 So. 172 ..... 10, 58
Sneed v. Phillips Pet. Co. (CCA 5 Tex.), 76 F. 2d 785 20
Spring v. Ohio Oil Co. (CCA 5 Tex.), 108 F. 2d 560 ..... 9, 15, 28
State ex rel Knox, Atty. Gen. v. Sisters of Mercy, 150 Miss. 559, 115 So. 323 ..... 42, 43
Stern v. Parker, ... Miss. ....., 25 So. 2d 787 50
Sun Ins. Office v. Scott, 284 U. S. 177, 76 L. Ed. 229 ..... 9, 16

Turner v. Hunt, 131 Tex. 492, 116 S. W. 2d 688, 117 A. L. R. 1066 24

United States v. Oregon, 295 U. S. 1, 24-25, 79 L. Ed. 1267, 1279 60
U. S. Industrial Chemicals v. Carbide & Chem. Corp. (DC NY), 52 Fed. Supp. 164 61

Vagaszki v. Consolidation Coal Co. (CCA 2), 225 F. 913, 921 ..... 8, 15, 22, 27
Verde River Irrig. & Power Dist. v. Salt River Valley Waters Users' Assn. (CCA 9), 94 F. 2d 936 ..... 6, 7, 14, 15, 20, 21

Wall v. Wall, 177 Miss. 743, 171 So. 675 50
Wilson v. Foster Creek Lbr. & Mfg. Co., 134 Miss. 880, 99 So. 437 ..... 10, 58

In The

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vs.

R. G. CALCOTE ET AL., *Respondents*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, with Supporting Brief

---

To the Honorable, the
Supreme Court of the United States:

Texas Pacific Coal & Oil Company, a corporation incorporated under the laws of the State of Texas, respectfully presents this its petition for writ of certiorari to the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit at New Orleans, Louisiana, in the case of R. G. Calcote et al. v. Texas Pacific Coal & Oil Company, No. 11549, heretofore decided by said Honorable Fifth Circuit Court of Appeals on July 31, 1946, and in which appellee's motion for rehearing was overruled with written opinion September 10, 1946,[1] to such and respectfully showing:

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[1]The Court's opinion has not yet been published, but is printed in the appendix of our Supporting Brief (pp. 64-83), and appears at pages 325-330, 383-388 of the printed Record.

JURISDICTIONAL STATEMENT

The jurisdiction of this Honorable Court is invoked under Sec. 240(a) and Subsection 8(a) of the Judicial Code as amended, 28 U. S. C. A. Sections 347 and 350, and Supreme Court Rule 38(5)(b).

BRIEF STATEMENT OF THE CASE

R. G. Calcote and wife, Mrs. Odessa Calcote, who on July 1, 1939, had executed to J. R. Penn an oil, gas and mineral lease on land at such time owned by them in Adams and Franklin Counties, Mississippi, known as the N. K. Farr Place, filed suit April 27, 1945, in the Chancery Court for the County of Adams, State of Mississippi, against petitioner (to whom such oil, gas and mineral lease had been assigned) to cancel such oil and gas lease on the grounds: *(1)* that it was void because, as they contended, the lease was taken by said J. R. Penn for such corporation, which had not qualified at such time to transact business in the State of Mississippi, the further contention being that such fact rendered the title[2] of defendant void; *(2)* that the lease was without consideration, it being alleged in that connection that while a consideration of $1.00 was recited as having been paid, that the same was not in fact paid. Further allegations showing the receipt by plaintiffs of five annual rental payments were made, and return thereof was tendered to defendant

[2]In Mississippi an oil and gas "lease" vests in the "lessee" a determinable fee in the oil and gas (*Koenig v. Calcote*, ... Miss. ...., 25 So. 2d 763; *Lloyd's Estate v. Mullen Tractor & Equipment Co.*, 192 Miss. 62, 4 So. 2d 282) and is an executed contract (*Chism v. Hollis*, 152 Miss. 772, 118 So. 713).

in plaintiffs' petition. It was alleged that plaintiffs had executed a new oil, gas and mineral lease to one Pete Norsworthy and cancellation of plaintiffs lease, removal thereof as a cloud upon plaintiffs' title, and establishment of Norsworthy's lease as valid, was prayed. (R. pp. 2-20.) The case was removed to the United States District Court for the Southern District of Mississippi, where plaintiffs filed a separate amendment, purporting to add a third count, in which they alleged that it was never the intention of plaintiffs to convey any land in Adams County, Mississippi, but only 600 acres in Franklin County, Mississippi, and that petitioner's agent, Kennedy "wrote into the description of the lands a vague description, attempting to cover some acreage of the N. K. Farr Place north of Coles Creek that may have been over the line in Adams County, Mississippi," and asking to have the said lease cancelled for alleged failure to pay rentals at the rate of 10c per acre on the whole of the land and to eliminate an alleged 86.94 acres from the lease as being located in Adams County, Mississippi. It was not, however, alleged that plaintiffs were not permitted to read their lease, or that plaintiffs were in any way defrauded by petitioner's agent. (R. pp. 42-45.) Petitioner filed its answer in the Federal Court, containing denials and various special defenses, asserting the validity of the lease, denying that the purchase of such lease constituted transacting business in Mississippi, setting up various acts alleged to be a ratification by plaintiffs of the lease subsequent to the time petitioner qualified to transact business in the State of Mississippi, particularly including the payment to and receipt by plain-

tiffs of five annual rental payments of $60.00 each, all as provided in the lease, and the conveyance by plaintiffs, subsequent to the qualification of petitioner to do business in the State of Mississippi, of royalty interests in the land in which conveyances it was specifically stated that such land was under lease to petitioner, and that a proportionate interest in the royalties therein provided were expressly assigned to such purchaser[3] (R. pp. 21-55). Petitioner also filed in the Federal Court a separate counter claim, alleging diversity of citizenship, substantially the facts set forth in its answer, and asking to have its lease confirmed as to the plaintiffs, and also that the plaintiffs' claim be cancelled as a cloud on its title, under applicable Mississippi Statutes.[4] (R. pp. 45-55.)

Although the conveyance by the Calcotes, subsequent to petitioner's qualification to do business in Mississippi of royalty interests under petitioner's lease was expressly alleged in petitioner's answer (R. pp. 28-29) no question of lack of parties was raised by plaintiffs, but they continued their assault on the validity of petitioner's lease, and their effort to establish Norsworthy's top lease as valid, and upon the trial the United States

[3]The Mississippi Supreme Court has expressly held such a conveyance to be a ratification and adoption of the lease and lessor is estopped to question its validity (*Cummings v. Mid-States Oil Corp.*, 193 Miss. 675, 9 So. 2d 648), and the Fifth Circuit has also so ruled in a late case appealed from Texas (*Glasscock v. Farmers Royalty Holding Co.*, 152 F. 2d 537), following the same cases cited by the Mississippi Supreme Court as authority for its holding in the Cummings case. Such an estoppel also arises against the grantee or assignee (*Humble O. & R. Co. v. Davis*, 282 S. W. 930, approved on this point in *Grissom v. Anderson*, 125 Tex. 26, 33, 79 S. W. 2d 619, 623; *Greene v. White*, 137 Tex. 361, 153 S. W. 2d 575.)

[4]2 Miss. Code Ann. 1942, Sec. 1323 (p. 143) and Sec. 1324 (p. 145), set out at pp. 57, 59 of petitioner's accompanying brief.

District Court filed conclusions of facts and law substantially that, while the petitioner was transacting business in Mississippi without having qualified at the time it took the lease, the failure to qualify under the laws of the State of Mississippi did not render such lease void in its entirety, and that plaintiffs were not entitled to recover. The Court further denied petitioner's counter claim, solely for the reason that petitioner had not qualified in the State of Mississippi at the time the lease was taken. (R. pp. 308-7.) On motion for amended findings of fact and reargument of the case, the Court filed amended findings of fact and conclusions of law, in which it was determined that by the receipt of rentals and by the conveyance of royalty interests under the lease the plaintiffs had ratified such lease contract; that such lease was valid and plaintiffs were not entitled to cancel the same, and that petitioner was entitled to recover on its counterclaim, and judgment was accordingly entered, confirming its oil and gas lease. (R. pp. 311-315.) Appeal was taken to the Honorable Fifth Circuit Court by plaintiffs, without assigning error as to any lack of parties, but upon the hearing thereof said Honorable Fifth Circuit Court of Appeals, on its own motion reversed the judgment below, holding that the royalty owners were indispensable parties, and remanded the cause, Judge Hutcheson dissenting in a written opinion. (R. pp. 325-340.)

Petitioner therefore presents this its petition for certiorari seeking to have such erroneous judgment reviewed, revised and corrected.

Grounds of Jurisdiction and Reasons for Allowance of Writ of Certiorari

The Honorable Fifth Circuit in reversing the judgment below and remanding the case with directions to make absent royalty vendees parties, without determining whether a cause of aciton was stated by plaintiffs, and in the face of facts and applicable decisions conclusively showing that no cause of action existed either in favor of plaintiffs or such absent royalty vendees, held contrary to decisions of this Court, other Circuit Courts of Appeal and of the Mississippi Courts, on important questions of Federal (as well as local) law and procedure, in the following respects:

1.

(Argued at pp. 19-22 of Petitioner's Supporting Brief)

The Honorable Fifth Circuit Court of Appeals, in reversing the judgment below and remanding the cause without determining the question of whether plaintiffs' petition stated a cause of action, held contrary to the decision of this court in Bourdieu v. Pacific Western Oil Co., 299 U. S. 65, 81 L. Ed. 42, and to the decision of the Ninth Circuit in Verde River Irrig. & Power Dist. v. Salt River Valley Water Users Assn., 94 F. 2d 936, in both which cases it was held that the petition should be examined to determine whether a cause of action was stated by plaintiff, and if none was apparent the judgment would be affirmed.

2.

(Argued at pp. 19-22, 32-34, of Petitioner's Supporting Brief)

The reversal by the Fifth Circuit and remand with directions to make the royalty purchasers parties, is directly contrary to the decision of this Court in Bourdieu v. Pacific Western Oil Co., 299 U. S. 65, 81 L. Ed. 42, and to the decision of the Ninth Circuit in Verde River Irrig. & Power Dist. v. Salt River Valley Water Users' Assn., 94 F. 2d 936, on an important question of Federal practice and procedure, in that the petition of plaintiffs in the trial court stated no cause of action, and it conclusively appeared from the facts in evidence in this case that such royalty vendees will have no right to set aside petitioners' lease if they are made parties, and therefore, as said by this court in the Bourdieu case "nothing is to be gained by an inquiry into the the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to decree in his favor." (299 U. S. 71, 86 L. Ed. 46.)

3.

(Argued at pp. 22-27 of Petitioner's Supporting Brief)

The decision of the Honorable Fifth Circuit in this case, reversing the judgment below and remanding the case with directions to make parties the royalty owners purchasing an interest in the royalties payable under the lease herein sought to be cancelled, was directly contrary to the salutary and important rule of Federal procedure and practice announced by this Court in Pugh v. McCormick, 14 Wall. 361, 373-4, 20 L. Ed. 789, 791, to the effect that a reversal should not

be ordered where it appears, "that the same party will be entitled to judgment if a new trial is granted," and to the Circuit Court of Appeals for the Second Circuit in Vagaszki v. Consolidation Coal Co., 225 Fed. 913, 921, that "there can be no reversal for errors committed against one who it is apparent is not entitled to succeed in his action in any event," it conclusively appearing from the record in this case that royalty owners whose presence were held necessary by the Fifth Circuit would have had no right to cancel petitioner's lease upon being made parties, they having taken their royalty interest in the land involved subject to petitioner's lease, with an express assignment of a part of the royalties payable thereunder. The Calcotes, by the execution of such royalty conveyances ratified, confirmed and adopted the oil and gas lease *(*Cummings Mid-States Oil Corp., 193 Miss. 675, 9 So. 2d 648*)* and were estopped thereby to question the validity thereof, and such royalty grantees if made parties, by taking an express conveyance of royalty payable under such oil and gas lease, would likewise be bound by such lease, and estopped to question such lease's validity (Humble Oil & Refining Co. v. Davis, 282 S. W. 930, reversed on another point, 296 S. W. 285, but subsequently approved on this point in Grissom v. Anderson, 125 Tex. 26, 33, 79 S. W. 2d 619, 623; Greene v. White, 137 Tex. 361, 386, 153 S. W. 2d 575, point 17*)*.

4.

(Argued at pp. 28-32 of Petitioner's Supporting Brief)

The Honorable Fifth Circuit, in reversing the judgment below and remanding the case to make absent

royalty vendees parties, held contrary to and disregarded (without overruling) on an important question of Federal practice and procedure, its former decisions in the case of Spring v. Ohio Oil Co., 108 F. 2d 560; Seeley v. Cornell, 74 F. 2d 353, 90 F. 2d 562, and Seeley v. Hunt, 109 F. 2d 594, and of the Fourth Circuit in Oxley v. Sweetland, 94 F. 2d 33, in each of which cases it was held that a reversal would not be ordered for lack of parties where the rights of such absent parties could be preserved by the judgment; and especially is this true in a case where, as here, the absent royalty vendees were assigned interests in the royalties provided to be payable by and claimed under the lease sought to be cancelled, and the judgment entered below was one upholding such lease.

5.

(Presented at p. 16 of Petitioner's Supporting Brief)

The Honorable Fifth Circuit, in reversing and remanding the case with directions to make the absent royalty owners parties where neither the plaintiffs nor the defendant raised any issue as to their absence, neither in the trial court nor on appeal, held contrary to the decision of the Sixth Circuit in the case of Home Insurance Co. v. Scott, 46 F. 2d 10, and of this Court on appeal of the same case (Sun Ins. Office v. Scott, 284 U. S. 177, 76 L. Ed. 229), on an important question of Federal practice and procedure, such case being a suit on fire insurance policies covering property on which there was a chattel mortgage, which policies provided that they should become void if the property be or become subject to a chattel mortgage, and it was

held that the policies were void because of such chattel mortgage, although the chattel mortgagee bank was not made a party, and that the absence of such chattel mortgagee could not be availed of by the insurer on appeal, it having elected to proceed with the suit without making the chattel mortgagee a party.

6.

(Argued at pp. 54-61 of Petitioner's Supporting Brief)

The Court in reversing judgment confirming petitioner's lease upon its counter claim against plaintiffs for lack of parties, disregarded and refused to give effect (1) to Sec. 1323, 2 Miss. Code Ann. 1942, p. 143 (which expressly permits the confirmation of title "as against all parties defendant"), and the decisions of the Mississippi Supreme Court thereunder (Wilson v. Foster Creek Lumber & Mfg. Co., 134 Miss. 880, 99 So. 437, and Smith v. Jassen, 105 Miss. 227, 62 So. 172) holding that such decree of confirmation does not "affect parties not defendants," and (2) 2 Miss. Code Ann. 1942, Sec. 1324, p. 145, authorizing suit for cancellation of cloud against any adverse claimant, and the case of McLendon v. McGee, ... Miss. ....., 198 So. 725, decided thereunder, holding that only the adverse claimant was a necessary party.

The attorneys for respondents are Hon. Forrest B. Jackson of the firm of Jackson & Young, Century Building, Jackson, Mississippi; Engle & Laub, Natchez, Mississippi; E. G. Truly, Fayette, Mississippi; and R. L. Corban, Fayette, Mississippi.

WHEREFORE petitioners respectfully pray that a writ of certiorari be granted herein, to the Honorable United States Fifth Circuit Court of Appeals directing such Court to certify the record herein to Your Honors, to the end that the decision of said Honorable Fifth Circuit Court of Appeals may be reviewed, revised, and the errors therein corrected; that upon hearing of said cause by this Court that the judgment of the said Honorable Fifth Circuit Court be set aside, the judgment of the trial court affirmed, or that such other proceedings be had herein as may be provided by law.

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TEXAS PACIFIC COAL & OIL COMPANY, *Petitioner*

vs.

R. G. CALCOTE ET AL., *Respondents*

Brief in Support of Petition for Writ of Certiorari

May It Please the Court:

In this case the Honorable Fifth Circuit Court of Appeals without (as petitioners understand its opinions[5]) deciding whether the petition of plaintiffs stated a cause of action, reversed the trial court's judgment in favor of petitioner (denying plaintiff's right to cancel petitioner's oil and gas lease and confirming petitioner's title thereto), *because of the absence of parties whose presence was not deemed necessary by either party or the trial court; where no question of their absence was raised in the trial court or on appeal by either party; where such absent parties have not sued or asserted any rights, and where (as petitioners earnestly insist) they could recover no relief if made parties because they have been assigned interests in royalty provided to be paid by and claim under petitioner's*

[5]The original and dissenting opinions and opinion on rehearing are printed as an appendix to this Brief (pp. 64-83), and appear at R. pp. 325-339, and (on rehearing) R. pp. 383-8 of the printed Record.

oil and gas lease and they, as such grantees, as well as plaintiffs as their grantors, are thereby estopped to question the validity of plaintiffs' lease. Petitioner deems this a very important question of Federal practice and procedure, in which the Fifth Circuit has held directly contrary to decisions of this Court and other Circuit Courts of Appeal. The questions raised will, in accordance with this Court's rules, be presented as briefly as possible, but are earnestly urged.

Questions Presented

1.

The Honorable Circuit Court of Appeals was required by the decisions of this Court and of other Circuit Courts of Appeal to determine whether a cause of action was alleged by plaintiffs, before reversing the trial court's judgment and remanding the cause with instructions to make additional parties, and if it found no cause of action alleged, the trial court's judgment should have been affirmed. In failing to so decide it held directly contrary to *Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 81 L. Ed. 42, and *Verde River Irrig. & Power Dist. v. Salt River Valley Water Users' Assn.*, 94 F. 2d 936, 940, by the Ninth Circuit on a very important question of Federal practice. (See pp. 19-22 hereof.)

2.

Under the pleadings and undisputed facts, the Calcotes ratified, adopted and confirmed petitioner's oil and gas lease by the receipt of five annual rentals, and by the conveyance of three-fourths of the royalty pro-

vided to be paid by such oil and gas lease, subsequent to the qualification of petitioner to do business in the State of Mississippi, and were therefore estopped to question the validity of such lease, and their royalty vendees were likewise estopped by their purchase of an interest in the royalties payable thereunder to contend that such lease was invalid. Neither the Calcotes nor their royalty vendees would be entitled to judgment of cancellation on another trial, and making then additional parties would be useless and vain. The Honorable Circuit Court of Appeals therefore held directly contrary to the cases of *Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 81 L. Ed. 42; *Pugh v. McCormick*, 14 Wall. 361, 373-4, 20 L. Ed. 789, 791; *Verde River Irrig. & Power Dist. v. Salt River Valley Water Users' Assn.*, 94 F. 2d 936, by the Ninth Circuit, and *Vagaszki v. Consolidation Coal Co.*, 225 F. 913, by the Second Circuit. (See pp. 22-27 hereof.)

3.

Since the rights (if any) of the absent royalty vendees could have been preserved by the judgment, if necessary to their protection, the Honorable Fifth Circuit, in reversing the judgment below and remanding the case to make them parties, held contrary to and disregarded (without overruling) on an important question of Federal practice and procedure, its former decisions in the case of *Spring v. Ohio Oil Co.*, 108 F. 2d 560; *Seeley v. Cornell*, 74 F. 2d 353, 90 F. 2d 562, and *Seeley v. Hunt*, 109 F. 2d 594, and the decision of the Fourth Circuit in the case of *Oxley v. Sweetland*, 94 F. 2d 33, in each of which cases it was held that a

reversal would not be ordered for lack of parties where the rights of such absent parties could be preserved by the judgment; especially where the judgment below, as here, upheld the validity of the oil and gas lease in which such royalty vendees were assigned interests. (See pp. 28-32 hereof.)

4.

Since neither plaintiffs nor defendant raised any issue as to the absence of the royalty vendees of plaintiffs, as parties, but the case proceeded to judgment without their presence, plaintiffs would not on appeal be entitled to a reversal because of the absence of such parties, and in reversing the judgment the Honorable Fifth Circuit therefore held contrary to the decision of the Sixth Circuit in the case of *Home Insurance Co. v. Scott*, 46 F. 2d 10, and of this court on appeal in the same case *(Sun Ins. Office v. Scott*, 284 U. S. 177, 76 L. Ed. 229), on an important question of Federal practice and procedure, it being there held that the fire insurance policies sued on were void because the property was encumbered by a chattel mortgage, contrary to the provisions of such policies, and judgment was rendered for the defendants, where plaintiff proceeded with the case without making the chattel mortgagee a party to such suits. (Further argument deemed unnecessary.)

5.

Plaintiffs below sought the cancellation of the petitioner's lease in their original petition on two grounds: (*1*) That the lease was without consideration (which allegation was destroyed by the further allegations in

their petition that the lease recited $1.00 consideration (R. p. 6) and that plaintiff had accepted five annual rentals of $60.00 each (R. p. 8); (*2*) That petitioner at the time the lease was executed had not qualified to do business in the State of Mississippi, which could not form the basis of a judgment for cancellation of petitioner's oil and gas lease, since (*a*) the oil and gas lease vested in petitioner a determinable fee (*Koenig v. Calcote*, ... Miss. ....., 25 So. 2d 763), and the Mississippi statutes requiring qualification of a foreign corporation before doing business are not statutes of escheat or forfeiture, and do not destroy a vested title, (*b*) the only penalty denounced by such statute is a fine and exclusion from resort to the State (and not Federal) courts to enforce a contract made before qualification (its capacity and right to defend its title against attack not being affected), and (*c*) the State of Mississippi alone (and not plaintiffs in any event) could affirmatively attack petitioner's acts before qualification as illegal. (*3*) (By amendment filed in the Federal Court) That petitioner's agent Kennedy wrote into the lease a vague description attempting to cover some acreage of the N. K. Farr Place north of Coles Creek that may have been over the line in Adams County, and that an insufficient amount of rentals had been paid, but such allegations fall short of alleging any ground for relief, because no fraud or overreaching is charged against said Kennedy, nor is it alleged that plaintiffs did not read, nor were prevented from reading the lease before its execution (necessary allegations under Mississippi decisions), and by the allegatons that five annual rentals had been received by the

plaintiffs. It further appeared from the undisputed proof that plaintiffs had conveyed three-fourths of their royalty under this lease subsequent to the qualification of petitioner to do business in Mississippi. Therefore, since no cause of action was stated by plaintiffs' petition, nor could any other judgment than the one entered below be rendered on a subsequent trial, the Honorable Fifth Circuit erred in enterng its judgment of reversal and remand. (See pp. 22-27 and 32-54 hereof.)

6.

Petitioner's counter claim for confirmation of its lease under 2 Miss. Code Ann. 1942, Sec. 1323, p. 143, and for cancellation of plaintiff's adverse claim as a cloud on its title under 2 Miss. Code Ann. 1942, Sec. 1324, p. 145, was a permissive one under Rule 13(b) of Federal Rules of Civil Procedure, and subject to separate trial and judgment under Rules 13(i) and 42(b). The Calcotes under such Mississippi Statutes were the only necessary parties to such counter claim. The Fifth Circuit clearly disregarded these applicable Mississippi statutes and decisions; since thereunder it should at all events have affirmed the judgment on such counter claim, or at most have reformed such judgment so as to cancel the Calcote's adverse claim as a cloud on petitioner's title, plaintiffs Calcotes not being entitled to another trial or another day in Court thereon. (See pp. 54-61 hereof.)

These questions will be presented briefly in their order.

Brief of Argument

I.

The Honorable Fifth Circuit Court of Appeals should have first decided whether plaintiff's petition stated a cause of action, and if it found that none was stated, the judgment of the trial court should have been affirmed. In so doing it held contrary to decisions of this court and of other circuits.

In its original opinion the majority of the Honorable Circuit Court of Appeals apparently assumed, without directly deciding, that plaintiffs' petition stated a cause of action, for, in the last paragraph on page three of its original opinion (R. p. 327) it stated that the question of indispensable parties should never await decision on the merits "if the complaint states a cause of action," and at the top of page 10 (R. p. 334) that "in the instant case, where the complaint states a cause of action, and Federal jurisdiction depends solely upon diversity of citizenship, there can be no dispensing with an inquiry as to the absence of indispensable parties." But in response to the strong attack made by petitioner in its motion for rehearing (R. p. 341-381), the court receeded from such assumption, and expressly did not determine whether a cause of action was alleged, saying in the first paragraph on page three (R. p. 385) of its opinion on rehearing that every indispensable party must be brought into court, or the suit will be dismissed "if a *substantial claim* is stated in the complaint" (italics volunteered), and

on page four (R. p. 386) it cited as authority for its opinion overruling motion for rehearing the case of *Sneed v. Phillips Petroleum Co.*, 76 F. 2d 785, saying that "*notwithstanding the contention there that no cause of action was stated, this court held that a substantial claim was presented in the complaint, and remanded the cause with directions to bring in the absent parties.*" (Italics volunteered.) And by reference to the opinion in the *Sneed* case (76 F. 2d 785, 789) it will be apparent that the majority there ordered a reversal to bring in the absent parties, *without determining whether a cause of action was alleged.* It is plain, therefore, that the majority followed the same course here, although no such difficult or far-reaching questions of substantive law are presented.

In so doing the Fifth Circuit ran expressly counter to the decision of this Court in *Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 81 L. Ed. 42, and to the decision of the Ninth Circuit in *Verde River Irrig. & Power Dist. v. Salt River Water Users' Assn.*, 94 F. 2d 936. In the *Bourdieu* case this Honorable Court held that the trial court should have dismissed the case for want of a cause of action, expressly refusing to pass upon the question of whether the United States was an indispensable party, because "*to enter upon a consideration of the question of their indispensability would be a vain waste of time*" (italics volunteered) (299 U. S. 71, 81 L. Ed. 46), and reversed the action of the Circuit Court of Appeals substantially similar to the decision of the Circuit Court of Appeals here. The majority here seeks to distinguish such case from the one at bar, but such attempt is not convincing. The

only point decided by the *Bourdieu* case was, that where the complaint failed to state a cause of action the court was not justified in entering upon a consideration of whether or not absent parties were indispensable. *If that point is eliminated from the decision, it will be destroyed, because no other was decided. A more direct case of conflict with and disregard of this Court's decision could hardly be imagined.*

Similarly, the Ninth Circuit in the case of *Verde River Irrig. & Power Dist. v. Salt River Water Users' Assn.*, 94 F. 2d 936, 940, refused to decide questions regarding indispensable parties because the petition of plaintiff stated no cause of action, following the *Bourdieu* case.

If plaintiffs failed to state a cause of action authorizing a cancellation of petitioner's lease, then justice will be subserved by affirmance of the judgment, rather than reversal, because upon retrial, and after delays necessary to make additional parties and settling their pleadings, the same judgment will have to be entered. While here but four royalty deeds were introduced in evidence (R. pp. 120-140), this court may, we think, take judicial notice that royalty interests are constantly and widely sold and resold; and whether the fact be true in this instance, it must certainly be true that in cases hereafter arising many hundreds of such conveyances will have been executed. The Honorable Fifth Circuit has rendered a decision requiring the presence of such royalty owners without exception, and without a determination of whether bringing them in as parties will serve a useful purpose, or otherwise. It is

earnestly urged that the question of Federal practice and procedure here presented is of the utmost importance, not only in this case but to Federal Jurisprudence generally, and that the decision of the majority of the Honorable Fifth Circuit is contrary to the decision of this Court and of other Circuits, and clearly wrong. The question presented is of such importance as to justify this Honorable Court in granting certiorari herein.

II.

Since it appeared from the undisputed evidence that, subsequent to petitioner's qualification to do business in Mississippi, plaintiffs executed conveyances granting interests in the royalties payable under this lease, and since under Mississippi decisions such constitutes a ratification, confirmation and adoption of petitioner's oil and gas lease, estopping plaintiffs from questioning its validity, and that its royalty grantees are likewise estopped by acceptance of such deed, the reversal of the judgment of the trial court was a vain thing, and should not have been ordered under Pugh v. McCormick, 14 Wall. 361, 373-4, 20 L. Ed. 789, 791, and Vagaszki v. Consolidation Coal Co., 225 F. 913, 921, by the Second Circuit.

Petitioner was granted the right to transact business in the State of Mississippi January 2, 1940 (R. p. 68). On March 6, 1944, plaintiffs conveyed to T. Steckol a one-sixteenth of the royalty interest (R. pp. 120-124); on July 6, 1943, they conveyed a one-half

interest to W. M. Smith (R. pp. 125-130); on March 6, 1944, they conveyed a one-sixteenth interest to A. Reid Wherrit (R. pp. 130-135), and on March 6, 1944, a one-eighth to A. Reid Wherrit (R. pp. 136-140). Each of such conveyances contain the following paragraph, varying only as to the amount of interest stated:

> *"Said land, or portions thereof, being now un-under oil and gas lease executed in favor of The Texas Pacific Coal & Oil Company it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-half of all the oil royalty, and gas royalty, and casinghead gas and gasolne royalty, and royalty from other minerals or products, due and to be paid under the terms of said leases."* (R. pp. 126-7.)

(Note that the recitation itself shows that Calcote knew the lease was in fact to the Texas Pacific Coal & Oil Co.)

Plaintiffs alleged in their petition that they had received the annual delay rentals of $60.00 per year on or before June 1, 1940, 1941, 1942, 1943 and 1944 which they tendered back to petitioner. (R. p. 8.)

The rule in Mississippi is similar to the rule in Texas, and thereunder a grantor who conveys a part or all of the land subject to an oil, gas and mineral lease described in the deed is estopped to question the validity of the oil and gas lease, whether it in fact covered the property or not, and regardless of the validity of the lease *(Cummings v. Mid-States Oil Corp.*, 193 Miss. 675, 9 So. 2d 648). In that case the Supreme Court of

Mississippi held the lessor estopped to contend that the lease did not cover a specific 10 acres of land, although expressly excepted from the lease, where such lessor had subsequently executed royalty deeds to the land covered by the lease in which the 10 acres was specifically described as being included in it. In so doing the Court followed *Grissom v. Anderson*, 125 Tex. 26, 79 S. W. 2d 619, where the oil and gas lease was invalid because not joined in by the lessors' wives, the property being a homestead; *Humble Oil & Refining Co. v. Clark*, 126 Tex. 262, 87 S. W. 2d 471, where the court repudiated the distinction between a void and voidable instrument, and held both could be ratified and adopted, and so decided (following *Grissom v. Anderson)* and *Turner v. Hunt*, 131 Tex. 492, 116 S. W. 2d 688, 117 A. L. R. 1066, where it was held that an oil and gas lease was made effective as to a tract of land not included in the lease (for the reason that the owner had not joined in such lease) because such owner had conveyed an interest in the royalty in the tract in controversy, reciting that such tract was covered by the oil and gas lease in question, and the conveyance was made subject thereto and conveyed an interest in the royalty.

This same rule of estoppel is applicable to the grantee of the royalty interest, as was expressly held in *Humble Oil & Refining Co. v. Davis*, 282 S. W. 930 (reversed on another point (Tex. Com. App.), 296 S. W. 285, but subsequently approved on this point by the Supreme Court in *Grissom v. Anderson*, 125 Tex. 26, 33, 79 S. W. 2d 623), where the lessor's grantee was held not entitled to attack the lease because not

properly acknowledged by the lessor's wife, the court saying:

> *"Aside from this however, the deed from Hill and wife to appellant purged the lease of any previously existing vice. This deed was executed and acknowledged with all essential legal formalities and was binding on all the parties to it. It recognized the lease as valid at that time, it conveyed to appellant one-half of the royalties reserved in the lease, and it provided expressly that appellant took title to the land conveyed subject to the lease."* (282 S. W. 933.)

To the same effect is the late case of *Greene v. White*, 137 Tex. 361, 153 S. W. 2d 575, where after full discussion and consideration of authorities the grantees of Mandy Garrett were held estopped to claim that the property was not subject to a reservation of minerals and a vendor's lien in favor of F. M. Greene, although Greene had no title to convey and the property was the homestead of Mandy and her deceased husband at the time Greene's deed to Alex Garrett, Mandy's husband, was executed (and the vendor's lien and reservation of minerals in the deed therefore void since Alex could not create a valid lien against or alone convey any interest in such homestead), because Mandy, subsequent to Alex's death, executed an extension of the vendor's lien notes described in the Greene deed, and thereafter conveyed, the court saying:

> "We are further of the opinion that Harvey Garrett and Jesse Baugus and his wife, Fannie Baugus, *by accepting the deed from Mandy Garrett conveying 60 acres of the 133 acre tract to*

Jesse Baugus and Harvey Garrett and by claiming and possessing the land under the deed, as shown by the undisputed evidence, ratified the deed from Greene to Garrett and became bound by the terms and provisions of that deed, including the reservation of the minerals." (153 S. W. 587.)

The rule is similarly stated in 31 *C. J. S.* Sec. 38, p. 216, viz:

> "As a general rule, a grantee is estopped to deny the validity of any outstanding interest, to which his deed recites that the conveyance to him is subject. Thus where the deed so recites, the grantee is estopped to deny the validity of an easement, lease or lien." (p. 216, 31 C. J. S.)

Since Calcote's royalty grantees would have no more standing in court to attack appellees' oil and gas lease than would Calcote, their interest is not in any way affected by the judgment below, and a reversal should not be ordered because of their absence. In *Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 81 L. Ed. 42, the court said:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. West v. Randall (C. C.), 2 Mason, 181, 196, Fed. Cas. No. 17,424 (opinion by Mr. Justice Story); Cole Silver Min. Co. v. Virginia & G. H. Water Co. (C. C.), 1 Sawy. 685, 689, Fd. Cas. No. 2,990 (opinion by Mr. Justice Field); Story, Eq. Pl. 8th

ed. sec. 77, 96. And see Russell v. Clark, 7 Cranch, 69, 98, 3 L. Ed. 271, 281; Elmendorf v. Taylor, 10 Wheat. 152, 167, 168, 6 L. Ed. 289, 294. Cf. Equity Rule 39." (81 L. Ed. 45.)

In *Pugh v. McCormick*, 14 Wall. 361, 20 L. Ed. 789, the Court said that a reversal will not be ordered "*where it appears that the error has become immaterial, and that the same party will be entitled to judgment if a new trial is granted.*" (Italics volunteered.) (14 Wall. 374, 20 L. Ed. 791) and in *Vagaszki v. Consolidation Coal Co.*, 225 F. 913, 921, the Second Circuit said that "*There can be no reversal for errors committed against one who it is apparent is not entitled to succeed in his action in any event.*" (Italics volunteered.)

These decisions are applicable here. By the judgment of the Honorable Fifth Circuit Court of Appeals, petitioner, who has been litigating since April 27, 1945, the date of filing of plaintiff's petition (R. p. 2), over the validity of its lease, *must go back to the trial court, make new parties, try the case over again, with the same result (assuming that making the royalty owners parties does not destroy the jurisdiction) and be brought back to the Fifth Circuit again for a decision of the same question of substantive law presented in this suit.* It is earnestly insisted that the court should grant a writ of certiorari to the end that these important questions of Federal procedure should be reannounced and made applicable to all classes of cases, to the end that litigation may be speeded up and justice be done between parties with a minimum expenditure of expense and time.

III.

Since the trial courts judgment confirmed the oil and gas lease under which the absent royalty grantees claimed and in which they had been assigned an interest in the royalties thereunder payable, their rights could have been saved by an appropriate provision in the judgment, and the Honorable Fifth Circuit Court of Appeals in reversing and remanding the case to make such absent royalty grantees parties held contrary to the Fourth Circuit in Oxley v. Sweetland, 94 F. 2d 33, and its own decisions in the cases of Spring v. Ohio Oil Co., 108 F. 2d 560; Seeley v. Cornell, 74 F. 2d 353, 90 F. 2d 562; and Seeley v. Hunt, 109 F. 2d 594.

As Judge Hutcheson in his usual forceful language pointed out in his dissent on original hearing,[6] the judgment below confirmed the lease, and did not cancel it. The effect of such judgment could not have been to prejudice the absent royalty grantees, and therefore the election of both parties to proceed without their absence should have been allowed to stand. In holding otherwise the majority held contrary to their former decisions in the case of *Spring v. Ohio Oil Co.*, 108 F. 2d 560; *Seeley v. Cornell*, 74 F. 2d 353, 90 F. 2d 562, and *Seeley v. Hunt*, 109 F. 2d 594, and to the Circuit Court of Appeals for the Fourth Circuit in *Oxley v. Sweetland*, 94 F. 2d 33.

The case of *Spring v. Ohio Oil Co.* (CCA 5 Tex.), 108 F. 2d 560, is very much in point. There the Ohio

[6]R. p. 337, Appendix to Supporting Brief, pp. 76-78.

Oil Company sued to quiet title to its oil and gas lease, making Spring the sole party defendant. The defendant moved to dismiss on the ground that the State of Texas had a royalty interest in the land, and that other parties named owned certain interests in the land also. The Court held the suit maintainable without their presence, saying:

> "It is also clear that neither the state of Texas nor the other parties named in the motion to dismiss are necessary and indispensable parties. The suit is against Spring and no one else. As to the state, the contention is that she has retained royalty and rental interests in the land and could not be sued without her consent. If Spring prevails the state will lose nothing. On the other hand, if the land in controversy is really in section 33, the state had nothing to convey and the lease to Spring would be voidable. In an action between private individuals asserting claims to the same land, under titles derived from the state, the state is not a necessary party. Roxana Petroleum Corp. v. Colquitt, D. C., 34 F. 2d 470, affirmed, 5 Cir., 49 F. 2d 1025.
>
> "The contention is that the individuals and corporations named by Spring as necessary and indispensable parties are citizens of Texas and have certain interests in the land requiring them to be joined as plaintiffs. It does not appear that Ohio Oil Co. is asking for relief against them or claims any rights under them. If it should be shown they have any rights in the land in controversy a decree may be framed to protect them. And to protect the rights of the state of Texas as well. They are not necessary or indispensable parties. Seeley v. Cornell, 5 Cir., 74 F. 2d 353." (108 F. 2d 561.)

As authority, the court cited *Seeley v. Cornell* (CCA 5 Tex.), 74 F. 2d 353 (see later appeals *Seeley v. Cornell* (CCA 5 Tex.), 90 F. 2d 562, and *Seeley v. Hunt* (CCA 5 Tex.), 109 F. 2d 594). In that case two daughters of Mrs. M. A. Smith sued James Cornell and others for a two-ninths interest in certain lands, inherited from their mother, Mrs. M. A. Smith, and for damages of fraud, etc., the suit being brought in their own interest and not that of their brothers and sisters, some of whom were residents of Texas, and whose presence would have destroyed jurisdiction because of lack of diversity of citizenship. The court held the suit could proceed, saying:

> "The rule as to who are considered indispensable parties in a suit in equity in Federal Courts has been repeatedly announced by the Supreme Court. In substance, it is this: Where the interests of the parties before the court are separable from those of the parties omitted, and the court can do justice between the parties before it, without prejudice to the rights of the absentees, jurisdiction will be maintained." (74 F. 2d 355.)

The same character of case was *Oxley v. Sweetland*, 94 F. 2d 33, by the Fourth Circuit. There Nellie Stratton Sweetland, claiming to be the widow of Louis R. Sweetland, deceased, a former resident of West Virginia, sued his administratrix and various of the next of kin to recover the personal property belonging to his estate, and claimed by her to be legally inherited by her as his widow. Only the next of kin residing in West Virginia were served. The Court held that the absence of those of the next of kin residing beyond the

boundaries of West Virginia was not fatal to a consideration of the case, and reversed a judgment in favor of plantiff establishing her rights to all of the personal property of the State, the Court saying:

> "We see no reason why the court cannot determine, as between plaintiff and those of next of kin who have been made parties, the right to that portion of the property claimed by such next of kin, without determining the right to the portion claimed by the others. It is true that in making the determination the court must pass upon a question of fact in which the absent claimants are interested, but their rights in the property will be in no manner affected by the determination or finding, which will be binding only upon the parties before the court. If the situation were reversed so that plantiff as claimant of the entire property were being sued by one of the nonresident next of kin to establish rights in the property, it would hardly be contended that the court would lack jurisdicion because all of the other next of kin were not parties. See *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260. We see no difference in the principle to be applied because the one claiming the entire property is the plaintiff instead of the defendant. In either case, it is only the interest which is in controversy between the parties before the court which can be adjudicated, and in neither can anything be done which will affect the interest of adverse parties or result in a situation inconsistent with equity or good conscience. Any other holding would greatly and unnecessarily narrow the jurisdiction of the federal courts in a class of cases where the maintenance of their jurisdiction is of the utmost importance." (94 F. 2d 36.)

Under these cases, and the decision of this court upon which they were based, the Honorable Fifth Circuit erred in reversing the judgment below.

Especially is this true under the statutes of Mississippi, which makes a judgment of confirmation of title "conclusive evidence of title as determined from the date of the decree *as against all parties defendant.*" (Italics volunteered.) This point is more fully presented under subsequent propositions. (See pp. 54-61 hereof.)

IV.

Aside from the fact that plaintiffs and their royalty vendees ratified, confirmed and adopted the oil and gas lease of petitioner subsequent to the qualification of petitioner to do business in Mississippi, by the plaintiffs receiving rentals and conveying interests in the lease, and by the royalty vendees acceptance of such conveyances, it is evident that plaintiff's petition does not state a cause of action under Mississippi laws, the three grounds attempted to be alleged being insufficient as a basis for cancellation of petitioner's lease.

(1) The contention that the oil and gas lease was without consideration was destroyed by plaintiffs' allegations that a consideration of $1.00 was recited and by the allegations of the receipt by them of five annual delay rental payments.

The petition (Par. 5, R. p. 6) contains the allegations that the lease contract provided for a consideration of $1.00 to be paid by the petitioner to the plain-

tiffs, and that such payment was not made. It is true that the failure of petitioner to pay the $1.00 would not authorize the plainitffs to cancel the lease for lack of consideration, because such recital imports a promise to pay at all events, and the petition further shows the plaintiffs accepted without objection annual delay rentals for five years (R. pp. 7-8). Such payments constituted adequate consideration. *Chism v. Hollis*, 152 Miss. 772, 118 So. 713; *Meder v. Superior Oil Co.*, 151 Miss. 814, 119 So. 318; *Longmire v. Marsh*, 124 Miss. 77, 86 So. 753.

An oil and gas lease in Mississippi vests in the lessee a determinable fee *(Koenig v. Calcote*, ... Miss. ....., 25 So. 2d 763; *Lloyd's Estate v. Mullen Tractor & Equip. Co.*, 192 Miss. 62, 4 So. 2d 282); it is an executed contract *(Chism v. Hollis*, 152 Miss. 772) and no consideration is necessary to support it *(Longmire v. Marsh*, 124 Miss. 77, 86 So. 753; *Day v. Davis*, 64 Miss. 253, 8 So. 203. *Dixon v. Milling*, 102 Miss. 449, 59 So. 804, 43 L. R. A. (N. S.) 916; *Jones v. Bevier* (Tex. Civ. App.), 59 S. W. 2d 945, writ refused). Calcote could not "dispute the existence of the consideration recited in the deed" *(Day v. Davis*, 64 Miss. 253, 8 So. 203); and, indeed, if the $1.00 was not in fact paid, payment thereof could be enforced by him, the recitation of the $1.00 consideration being equivalent to a promise to pay, if it was not in fact paid. *(Silverman v. Emerson*, 257 S. W. 612; *Garber v. Hauser*, 76 Okla. 292, 185 P. 436.)

(2) The allegations that petitioner had not qualified to do business in Mississippi do not constitute any cause of action in plaintiffs, since the Mississippi statutes do not forfeit or escheat the determinable fee in the oil, gas and minerals, which vested in petitioner under Calcotes' oil and gas lease, but carry instead the sanction of a fine and exclusion from resort to its (and not the Federal) courts; and if petitioner's title to such lease was illegal, only Mississippi could take advantage of such illegality.

At the threshold of this proposition, it is urged that this suit in its ultimate effect is not to enforce or strike down an executory contract, but to destroy—not for the sake of the public, but for the Calcotes' own personal enrichment[7]—a vested title in real estate, theretofore solemnly conveyed by themselves, the validity of which not only went unquestioned by the Calcotes for six years, but which was repeatedly affirmed by them by the receipt and acceptance of five annual delay rentals.

Section 5343, 4 Miss. Code Ann. 1942, page 415, requires the filing of articles of Incorporation by a foreign corporation before transacting business in the state, and is in the following language:

> "Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly

[7]Under the express terms of the royalty deeds the Calcotes take all of the bonus for a new lease (R. pp. 122, 127, 132, 137-8).

certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, shall be liable to a fine of not less than $100.00. This section shall not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations." (4 Miss. Code Ann. 1942, Sec. 5343.)

The Supreme Court of Mississippi has expressly held that the effect of this statute is not to avoid the contract in its entirety, and that no one but the State of Mississippi can assert invalidity of a person's or corporation's title to real estate thereunder. *Citizens Bank of Hattiesburg v. Grigsby*, 170 Miss. 655, 155 So. 684. There Grigsby and another brought an action of unlawful entry and detainer in Forrest County, Mississippi, against the bank. Grigsby and his co-plaintiff claimed under a sale under a deed of trust executed by E. J. Wiliams, the then owner of the property, to Franklin Bond & Mortgage Co., a Tennessee Corporation, which had not qualified to do business in Mississippi, although it maintained an office in Mississippi "and entered into numerous transactions, lending money and taking deeds of trust to secure such loans."

(155 So. 684-685.) Subsequent to the execution of the deed of trust to the Franklin Bond & Mortgage Co., Williams executed a deed of trust to the Citizens Bank, and later conveyed the property to such bank in satisfaction of the debt. Franklin Bond & Mortgage Co. then caused a sale under its deed of trust, and the property was brought in by Hatchie Investment Co. (alleged to be a subsidiary or conduit for the Franklin Co.) who conveyed to Grigsby and his co-plaintiff. It was contended that both the contract between Williams and the Franklin Bond & Mortgage Co. and the deed of trust were void because that company, being a foreign corporation, was not authorized to do business in the State of Mississippi, and "that the foreclosure proceedings were void for that reason." (155 So. 685.) Very applicable here, the court, denying such defense, said:

> "It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention, that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. *We do not think the statute avoids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi.* In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser.

In the original contract between the Franklin Bond & Mortgage Company and Williams, the title passed from Williams to the trustee. **The language of the statute does not make the contract entirely void.** See Middleton v. Georgetown Mercantile Company, 117 Miss.134, 77 So. 956; Long Beach Canning Company v. Clark, 141 Miss. 177, 106 So. 646; Nicholson v. Myers (Miss.), 154 So. 282; Quitman County v. Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See, also, Springfield Grocery Co. v. Devitt, 126 Miss. 169, 88 So. 497.

"In our opinion, the case of Long Beach Canning Co. v. Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by section 935, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an unreasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporation.

"*The state might take appropriate action, and might possibly forfeit the property acquired by a foreign corporation which had not complied with*

the law, but only the state could take such action. The statute denies access to the courts by such a corporation, and the courts merely leave them as they are found, and will not aid in refusing rights growing out of the contract made without complying with the law. The law does not favor forfeitures, and, before forfeitues will be decreed or adjudged, they must come within the terms of the statute imposing that liability." (155 So. 685, 686.)

By 1 Mississippi Code Anno. 1942, Sec. 1120, p. 1025,[8] remedy by quo warranto in the name of the State of Mississippi is provided "Whenever any nonresident, alien or corporation shall acquire or hold land contrary to law." And in *Home Mutual Bldg. & Loan Assn. v. Leonard*, 77 Miss. 39, 25 So. 351, the association sued in unlawful detainer to recover possession of a house and lot which it had purchased at a trustee's sale under a mortgage held by it. The defendants defended on the ground that the money evidenced by the mortgage note was advanced at a fixed premium; that fines were compounded, being fines on fines; etc.; in other words, that the Building & Loan Association had acquired its title as the result of its violation of the laws of Mississippi. A judgment for defendants was reversed on appeal, because the defenses which were available to defendant were equitable, and could not be urged at law; but, applicable here, the Court said:

"*It is not allowable for them (defendants) further to present as a defense here matter which*

[8]See Appendix to Brief p. 85 for text of Section referred to.

would sustain a proceeding by quo warranto on the part of the State." (25 So. 352.)

In *Long Beach Canning Co. v. Clark*, 141 Miss. 177, 106 So. 646, the company, a Louisiana Corporation, sued Clark and others in the Circuit Court of Harrison County, Miss., to recover the difference between the sale price of the Canning Company's factory, boats and equipment in Gulfport, Miss., which the defendants had purchased at an auction sale in the City of Gulfport but which purchase the defendants had refused to complete, and the price such property brought at a resale. The defendants specially pleaded that the Canning Co. was a Louisiana corporation which had continuously done business in Mississippi without qualifying under its laws, and on this ground the suit was dismissed by the Harrison County Circuit Court. This judgment on appeal was reversed and remanded, the Supreme Court of Mississippi saying that the transaction did not grow out of the operation of the business transacted in Mississippi without a permit, but that it was a sale of the assets of the Corporation for the purpose of ceasing to do buiness, and that the sale of the property was not forbidden by the Mississippi statutes; further saying, applicable here, that:

"The corporation, having acquired the property in the state, had a right to dispose of it regardless of the fact that it had previously done business in the state contrary to the public policy and statutes of the state.

"*The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to*

those doing business in violation of the law without recording their charter." (106 So. 648.)

The Mississippi Supreme Court, as authority for its holding in the case of *Citizens Bank of Hattiesburg v. Grigsby*, supra, also cited the case of *Middleton v. Georgetown Merc. Co.*, 117 Miss. 134, 77 So. 956, as supporting its statement of the law. That was a suit by the Mercantile Co. to recover possession of a tract of farm land occupied and formerly owned by Middleton. The Mercantile Co. had acquired title to the land by foreclosure sale under a deed of trust, at which time the land was farm land and used for agricultural purposes. Middleton defended on the ground that the Mercantile Co. was a corporation; that the property was agricultural land and that it had been acquired by the Corporation plaintiff in violation of Chapter 162, Acts of 1912, the Laws of Mississippi, which forbids the acquisition of land by a corporation for agricultural purposes. The Circuit Court of Copiah County, Mississippi, gave judgment for the Mercantile Co., and Middleton appealed. The court expressly refused to pass on the question whether the corporation had acquired the land for agricultural purposes, prohibited by the law, because it upheld the judgment of the trial court on the ground that the appellant grantor, Middleton, could not attack the title of the Mercantile Co. in the case, saying:

"The ground upon which we rest in affirming the judgment of the lower court *is that the appellant grantor cannot be heard to assail the title to the land in the appellee corporation in this case. This cannot be done by the grantor.*" (77 So. 957.)

The case of *Quitman County v. Stritze*, 70 Miss. 320, 13 So. 36, was also cited in the opinion of the *Citizens Bank of Hattiesburg, Mississippi, v. Grigsby*, supra, and that case is very important.

The County sued to cancel the claims of Stritze and others as clouds on the title to certain lots within its borders which had been donated the County, to which the defendants replied that the County had no power under Mississippi laws to acquire or own the lots, and therefore was not entitled to cancel their claims. Judgment went in their favor, and the County appealed. The Supreme Court of Mississippi reversed because neither Phelps, the County's donor, nor the defendants who claimed derivatively from him, had any right to question the County's ownership, but that only the state could object. The Court said:

> "*By the conveyance from Phelps the title to the land passed to the board of supervisors of Quitman County, and neither he, nor the defendants, who claim derivatively from him, have any interest in the question whether this body shall be permitted to own and possess or sell the same; that is a matter between the board and the state, in which strangers have no right to be heard.* Grant v. Coal Co., 80 Pa. St. 218; Leasure v. Insurance Co., 91 Pa. St. 491; Mallett v. Simpson, 94 N. C. 37; Cowell v. Springs Co., 100 U. S. 55; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. Rep. 336; Union v. Yount, 101 U. S. 352; Hough v. Land Co., 73 Ill. 23. The complainant is entitled to the relief prayed. The decree is reversed, and the cause remanded." (13 So. 36.)

These decisions are directly in point upon the question presented by the suit of plaintiffs Calcotes. They are seeking to destroy a title, and that, too, a title granted by themselves, since under Mississippi decisions the oil and gas lease vested a determinable fee in the minerals in petitioner *(Koenig v. Calcote,* ..... Miss. ....., 25 So. 2d 763; *Lloyd's Estate v. Mullen Tractor & Equip. Co.*, 192 Miss. 62, 4 So. 2d 282), and was an executed contract. *(Chizum v. Hollis,* 152 Miss. 772, 118 So. 713.) If the title thereby vested in petitioner is to be forfeited or annulled, under the foregoing decisions of the Supreme Court of Mississippi it must be done by the state itself; and until and unless it does, the determinable fee conveyed by such oil and gas lease remains validly vested in petitioner and not subject to the attack of the Calcotes, the grantors in such conveyance.

Three other cases by the Supreme Court of Mississippi *(Peeples v. Enochs,* 170 Miss. 472, 153 So. 796, *State et rel. Knox, Atty. Gen., v. Sisters of Mercy,* 150 Miss. 559, 115 So. 323, and *Federal Land Bank v. Cooper,* 190 Miss 490, 200 So. 729), should be referred to. In the *Peeples* case Peeples conveyed to Enochs as trustee for a religious corporation certain real property in Mississippi. The religious corporation owned all the real property it was permitted to own in the state under the Mississippi statutes, *which further prohibited such corporation from taking title to any additional property.* Suit by Peeples and his associates on the note executed by Enochs and the other trustees for the church was defended on the ground that the purchase of the property for the use and benefit of

the church was in direct violation of Section 4169, Miss. Code 1930, prohibiting the purchase of such property by the church, which fact was alleged to have been known by the grantors at the time the conveyance was made. This contention was denied, the Supreme Court of Mississippi saying:

> "But the appellees say that the purchase of the land for the benefit and use of the church violates section 4169, Code 1930, which fact the appellants knew when they executed the deed and received the notes and deed of trust, and, therefore, cannot invoke the aid of the courts in the collection of the notes. *Whether they here violated the statute is of no concern of the appellees. They have acquired title to the land and can continue to use and enjoy it unless and until the right so to do is successfully questioned in a direct proceeding by the state.* Quitman County v. Stritze, 70 Miss. 320, 13 So. 36; Taylor v. Alliance Trust Co., 71 Miss. 694, 15 So. 121; Middleton v. Georgetown Mercantile Co., 117 Miss. 134, 77 So. 956; State v. Sisters of Mercy, 150 Miss. 559, 115 So. 323; cf. Southern Realty Co. v. Tchula Co-op. Stores, 114 Miss. 309, 75 So. 121.
>
> "The court below should have awarded the appellants an ordinary personal deficiency judgment against the appellees." (153 So. 797-8.)

In *State ex rel Knox, Atty. Gen., v. Sisters of Mercy*, 150 Miss. 559, 115 So. 323, the Attorney General of Mississippi brought suit to escheat to the State a considerable amount of valuable real estate owned by the Sisters of Mercy in Mississippi. The Court denied the suit, saying:

"The property involved is in excess of that which, under the statute, appellee Sisters of Mercy was authorized to own and hold. That fact is unquestioned. The position of the state is that property so held by a religious society is forfeited to the state, while appellee Sisters of Mercy contends that no such forfeiture takes place, because none is provided by the statute." * * * "*The statute here involved contains no provision for forfeiture of title to the property held in violation of it. Does the forfeiture take place in the absence of such a provision in the statute? We think this question is answered in the negative by the decisions of our court as well as the courts of this country generally.*" (115 So. 325.)

Certainly if the State of Mississippi has no right to forfeit the title to property expressly held in violation of its laws, the Calcotes could not here forfeit a title granted by them, in the absence of an express statute so authorizing.

In *Federal Land Bank v. Cooper*, 190 Miss. 490, 200 So. 729, the reservation or exception of one-half the minerals by the Federal Land Bank was attacked as ultra vires. The Court said:

"One of the well-settled rules developed by the courts in dealing with claimed ultra vires acts of corporations is that a corporation's right to acquire and hold land—whether in violation of its charter or laws or public policy of the State—can be questioned only by the state in which the land lies or the sovereignty from which the corporation received its charter. Nicholson v. Myres, 170 Miss. 441, 154 So. 282, and authorities there cited; Taylor v. Alliance Trust Co., 71 Miss. 695, 15 So.

121; Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Fritts v. Palmer, 132 U. S. 282, 10 S. Ct. 93; 33 L. Ed. 317. A legion of other cases so holding will be found collated in 4 Thompson on Corporations, 3d Ed., Par. 2478, Note 19, and note to Puget Sound National Bank v. Fisher, 52 Wash. 246, 100 P. 724, 17 Ann. Cas. 526. *"Whether the appellant is without the right to hold these minerals cannot here be challenged by the appellees."*

In cases where an offending corporation has sought to recover on a contract made while transacting business without having qualified as provided by Mississippi laws, the Court has denied the plaintiff's right to sue in many instances, terming the contract as unenforceable, and sometimes as void and unenforceable. Such is the case of *Newell Contracting Co. v. State Highway Com.*, 195 Miss. 395, 15 So. 2d 700. Such language, as said in the cases of *Griefield v. Gibralter Fire & Marine Ins. Co.*, ... Miss. ....., 24 So. 2d 356, and *Pace v. State*, 191 Miss. 780, 4 So. 2d 270, must be limited to the issues before the Court. The purpose of the statute, in a case where title to property was assailed, as here, was thus stated in *Citizens Bank of Hattiesburg v. Grigsby*, 170 Miss. 655, 155 So. 684, as follows:

"The statute denies access to the courts by such a corporation, and the courts merely leave them as they are found, and will not aid in refusing rights growing out of the contract made without complying with the law. The law does not favor forfeitures, and, before forfeitures will be decreed

or adjudged, they must come within the terms of the statute imposing that liability." (155 So. 686.)

As thus interpreted, the Supreme Court of Mississippi is in accord with this Honorable Court in *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317, *David Lupton's Sons Co. v. Automobile Club of America*, 255 U. S. 489, 56 L. Ed. 1177, and other cases. In the *Fritts* case the statutes of Colorado required a foreign corporation to qualify before transacting business, and, as the statutes were interpreted by this Honorable Court, *before purchasing or holding real estate in Colorado.* (132 U. S. 288, 33 L. Ed. 319.) The suit was in ejectment to recover certain real property, bought by Fritts, the purchaser at trustee's sale under a deed of trust made to him by the Comstock Mining Co., a Missouri Corporation, which at the time of the execution of the deed of trust was transacting business in Colorado without having qualified as required by Colorado laws. The defendant in possession claimed under the grantor of the mining company, asserting that the title never passed to the mining company because it was transacting business in Colorado without qualifying, and by such law was prohibited from purchasing or taking title. This Honorable Court, after adverting to the fact that the Colorado statutes did not exclude foreign corporations altogether from purchasing or holding real estate within its limits, and did not declare absolutely or wholly void as to every purpose a conveyance to a foreign corporation which had not qualified, but that (although the corporation was prohibited from purchasing) the only penalty im-

posed was to make the officers, stockholders and agents personally liable for the Company's contracts, said:

> *"The fair implication is that, in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State.* It is not for the judiciary, at the instance or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. *If Groshon, the grantor of the Comstock Mining Company, had himself brought this action, the injustice of his claim would be conceded.* But the present plaintff, who asserts title under a quit-claim deed from Groshon made after the property had passed, by the sale under the deed of trust, from the mining company, cannot, in law, occupy any better position than the original grantor would have done if he had himself brought this action. *If the Legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the State, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested."* (33 L. Ed. 320.)

So, here, the Mississippi legislature has deemed it sufficient to levy a fine of $100.00 against an offend-

ing corporaton.[9] It has not prohibited the corporation from purchasing property, nor from taking title to property, nor has it declared that titles taken while transacting business without qualifying in that State are void. The Mississippi Courts have not said—indeed, they have denied—any such purpose in the Mississippi legislature.

Fritts v. Palmer, supra, was followed in the leading and important case of *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, where it was held that the prohibition against suit in the courts applied only to the State Courts, and not to the Federal Courts, and though the Company was transacting business in the State of New York without a certificate of authority, and could not sue in the courts of New York, it could nevertheless sue in the Federal Courts.

It plainly appears, therefore, that on the main contention urged by plaintiffs, no cause of action was stated, and that petitioner's title to its oil and gas lease—a determinable fee under Mississippi decisions —was not subject to plaintiffs' attack.

(3) Nor were plaintiffs entitled to any relief under their amendment filed in the Federal Court, alleging substantially that they did not intend to cover or include any part of the N. K. Farr Place in Adams County, Mississippi, nor under their further allegations that the rentals provided in the lease should have been 10c per acre instead of a stipulated sum of $60.00, there being no allegation that they

[9]See Section 5343, 4 Miss. Code Ann. 1942, p. 415, quoted at pp. 34-35 of Brief.

were in any way defrauded by petitioner's agent taking the lease, nor that they were in any way prevented from reading the lease before its execution by them, these allegations being essential under Mississippi decisions to relief against a contract voluntarily signed.

By an amendment filed directly in the Federal Court (R. pp. 42-45), plaintiffs added paragraph 6(a), alleging alternatively that petitioner's agent, Kennedy, when he wrote up the lease, "wrote into the description of the land a vague description, attempting to cover some acreage of the N. K. Farr place north of Coles Creek that may have been over the line in Adams County in Mississippi"; "that it was never the intention of the plaintiff to convey the land in Adams County, Mississippi, but only the 600 acres described in Franklin County, Mississippi," that it was the purpose and intent of the lease contract that delay rentals would be paid at the rate of 10c per acre and that the rentals were not paid in accordance with such understanding and therefore the whole lease was void for failure to pay rentals. It was prayed that the whole lease be adjudged void and, alternatively, that the 86.94 acres in Adams County be eliminated from the lease. (R. pp. 44-45.) It was not alleged that petitioner's agent Kennedy was guilty of any fraud or deception, nor that he misrepresented the terms of the lease, nor that plaintiffs were prevented in any way from reading the lease and understanding its terms before they executed it.

The description contained in petitioner's oil and gas lease plainly provided that it covered "also any part

of said Farr place that may be over the line of Adams County, now owned by me" (R. p. 211) and is in all respects substantially the same as in the deed whereby plaintiff acquired title to the land (R. p. 147) the acreage in both deed and lease is stated to be "600 acres more or less." The oil and gas lease plainly provided for delay rentals in the sum of $60.00 for each year's delay in drilling, and in no way referred to 10c per acre. (R. p. 213.)

These allegations are clearly insufficient to form any basis for relief under Mississippi decisions, it being necessary thereunder to clearly show fraud or deception on the part of the other party, or that the other party prevented the plaintiff or person seeking to avoid his contract from reading the same before execution. *McCubbins v. Morgan*, ... Miss. ....., 23 So. 2d 926; *Koenig v. Calcote*, ... Miss. ....., 25 So. 2d 763; *Alliance Trust Co. v. Armstrong*, 185 Miss. 148, 186 So. 633; *Gunter v. Henderson Molpus Co.*, 149 Miss. 603, 115 So. 720; *Continental Jewelry Co. v. Joseph*, 140 Miss. 582, 105 So. 639; *Caulk v. Burt*, 112 Miss. 660, 73 So. 618; *Wall v. Wall*, 177 Miss. 743, 171 So. 675; *Fornea v. Goodyear Yellow Pine Co.*, 181 Miss. 50, 178 So. 914.

The principle applicable here was very clearly announced in the case of *Alliance Trust Co. v. Armstrong*, 185 Miss. 148, 186 So. 633, where Armstrong brought suit to cancel a deed of trust on land, and a note thereby secured, on the grounds among others that the note was barred by the six year statute of limitations. The bar of limitation had fallen but for

a written contract of extension, as to which extension contract Armstrong contended that in making it he did not mean to extend the date of payment of the note so as to prevent the note from being barred on July 1, 1936; that the extension agreement was prepared by the trust company's lawyer, and signed by appellee in a hurry without a careful examination, and that as soon as he discovered the mistake two or three days later, he advised such trust company's attorney of the fact and requested the preparation of another agreement. The trust company's attorney did not agree to this, and Armstrong sued. The Court said:

> "*The appellant's attorney was under no mistake as to what this agreement set forth*, and did nothing to induce the appellee not to read and familiarize himself with it, and the appellee is an attorney at law, evidently of wide business experience. According to 12 Am. Jur., Contracts, Section 137: '*The courts appear to be unanimous in holding that a person who, having the capacity and an opportunity to read a contract, is not misled as to its contents and who sustains no confidential relationship to the other party cannot avoid the contract on the ground of mistake if he signs it without reading it, at least in the absence of special circumstances excusing his failure to read it. If the contract is plain and unequivocal in its terms, he is ordinarily bound thereby. It is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. To permit a party, when*

sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.' See, also, 9 Am. Jur., Cancellation of Instruments, Section 34, and authorities cited in annotations to Hurst v. National Bond & Invest. Co., 59 A. L. R. 807, and Vallentyne v. Immigration Land Co., 5 Ann. Cas. 214. Such is the rule of this Court. Caulk v. Burt, 112 Miss. 660, 73 So. 618; Wall et al v. Wall et ux., 177 Miss. 743, 171 So. 675; cf. Continental Jewelry Co. v. Joseph, 140 Miss. 582, 105 So. 639; Gunter et al v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720; Fornea v. Goodyear Yellow Pine Co. et al., 181 Miss. 50, 178 So. 914." (186 So. 635.)

This case was followed in the latter case of *McCubbins v. Morgan*, ... Miss. ....., 23 So. 2d 926, where appellee contended that he did not know that one of the two instruments executed at the same time was a mineral deed to one-half of the minerals, and in *Koenig v. Calcote*, ... Miss. ....., 25 So. 2d 763, where Calcote sought to cancel a deed to one-half of the minerals to Koenig on the ground of fraud, and in which the Court said:

"The testimony is in sharp conflict as to whether or not at the time of the execution of the instrument in question the grantee represented it to be a mere lease, and it is also disputed as to whether or not he explained its provisions which are found to be to the contrary. The trial court did not find as a fact that the alleged fraudulent representations were made, or that the grantors

were induced by any misrepresentations not to read the deed before executing the same. But on the contrary the court found that fraud in the legal sense had not been shown; although the court was of the opinion that obviously the grantors did not have nor could have had the import of the conveyance in mind, as written, at the time they signed the same.

"However, this Court held in the case of McCubbins v. Morgan et al., Miss., 23 So. 2d 926, 927, that relief against a conveyance cannot be had merely on the ground that the grantor 'did not read the deed, and that the contents thereof were not explained.' In support of this announcement the Court quoted its former holding to the effect that '*A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him, and that he supposed the terms were different, unless he was induced not to read it or have it read to him by fraudulent representations made to him by the other party, on which he was entitled to rely,*'— citing the cases of Continental Jewelry Co. v. Joseph, 140 Miss. 582, 585, 105 So. 639; Gunter v. Henderson Molpus Co., 149 Miss. 603, 621, 115 So. 720; Fornea v. Goodyear Yellow Pine Co., 181 Miss. 50, 64, 178 So. 914; Alliance Trust Co. v. Armstrong, 185 Miss. 148, 163, 186 So. 633.

"Therefore, unless the trial court had found that the proof was clear and convincing to the effect that the grantors in the instant case were induced not to read the conveyance or have it read to them by reason of fraudulent representations of the grantee as to the nature and character of the instrument, then the action of the court in failing to cancel the same on the ground of fraud

cannot be reversed, unless under our view of the evidence the failure to so find was manifestly wrong." (25 So. 2d 764, 765.)

Under this line of decisions, clearly in Mississippi a grantor must show fraud on the part of grantee, to be relieved from his contract or deed. The description in petitioner's oil and gas lease plainly covers all of the N. K. Farr Place in Adams County, as well as in Franklin County. It also as plainly provided for delay rentals in the sum of $60.00 annually, where drilling operations were delayed, and not 10c per acre. No fraud is alleged on the part of petitioner's agent taking the lease, and such lease must stand as written.

Under no theory, therefore, were plaintiffs entitled to recover. Such being true, the Fifth Circuit Court of Appeals should have ended the case by affirming the judgment below, rather than remanding it for the purpose of making parties who could not possibly be affected by the suit. To do so is to again enact the comedy of "Much Ado About Nothing," with the probability that the value of the property involved will be destroyed by drainage of the oil and gas from under the property covered by the oil and gas lease. Such indeed "would be a vain waste of time." *(Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 71, 81 L. Ed. 42, 46.)

V.

In reversing the trial court's judgment on petitioner's counter claim seeking to confirm its title as against the Calcotes only under Section 1323, 2 Miss. Code Ann. 1942, and to cancel the claims

of the Calcotes as clouds on its title under Section 1324 of such code, the Honorable Fifth Circuit disregarded applicable Mississippi statutes and decisions, since thereunder petitioner was entitled to confirm its title as against the Calcotes, and to remove their claims as clouds upon their title, and they were the only necessary parties to the suit. Such counter claim was permissive under rule 13(b), and subject to separate trial and judgment under rule 13(i) and 42(b), Federal Rules of Civil Procedure and was not affected by any lack of parties to plaintiffs' suit.

Petitioner after the removal of the cause to the Federal Court filed a counterclaim separately from its answer (R. pp. 45-55), setting up its lease, alleging the payment of the consideration, the payment of delay rentals, the cooperation of R. G. Calcote with Appellee in curing defects in the title, the survey of the property with the knowledge and assistance of R. G. Calcote, made its motion for summary judgment (R. pp. 55-140), showing fully the conveyances of three-fourths of the royalty under the lease by the Calcotes, their receipt of rentals, etc., an exhibit, and prayed for entry of a decree cancelling the cloud on its title cast by the claims of Calcote; that it be adjudicated to have a valid lease on the land in controversy, and that the title thereto be confirmed.

The trial Court found that the oil and gas lease was not void under the Mississippi laws; that petitioner under *McLean v. York Oil Co.* (CCA 5), 138 F. 2d 804, would have the right to sue in the Federal Courts, that

the lease had been ratified by plaintiffs "and therefore the plaintiff is not entitled to any relief by its suit, but the defendant and cross-plaintiff is entitled to the relief sought by its counter suit." (R. p. 310.) (See, also, R. pp. 313, 314.)

In its decree the trial Court dismissed plaintiffs' suit, but permitted defendant to file its counterclaim, reciting that "it appearing to the court that the defendant, the Texas Pacific Coal & Oil Company is entitled to the relief prayed for in its counterclaim," it is ordered and adjudged that the lease of Appellee "be and hereby in all things ratified and confirmed in favor of the Texas Pacific Coal & Oil Company as against the plaintiffs and each of them according to the terms thereof." (R. pp. 314-315.)

Under Section 1314, 2 Miss. Code 1942 Ann. p. 138, entitled "Proceedings to Confirm Tax Title," it is probable that all persons whomsoever must be made made parties and served with process in the manner provided in that section *(Stern v. Parker,* ..... Miss. ....., 25 So. 2d 787). Appellee's counterclaim, however, insofar as it sought a confirmation of its title, was not prosecuted under that section, nor under Art. 1315, 2 Miss. Code 1942 Ann., p. 140, providing for the confirmation of a state land patent, in which the state must be made a party, but under Section 1323, entitled "Any Other Title May Be Confirmed" (2 Miss. Code Ann. 1942, p. 143), and as to removal or cancellation of cloud under Section 1324 (2 Miss. Code Ann. 1942, p. 145), entitled "Removing Clouds Upon Titles." These sections will be noticed separately, the

one now material being Section 1323. Such section is here quoted:

> "Sec. 1323. ANY OTHER TITLE MAY BE CONFIRMED.—The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof, may file a bill in the chancery court to have his title confirmed and quieted; and the law for notice, process, proceedings, and practice, as provided for confirming and quieting tax-titles shall apply, no matter by what tenure the complainant may hold; and unknown and non-resident parties may be made defendants as they are made defendants to proceedings to confirm tax-titles. If on the final hearing of any such suit the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant."

It will be noticed that the owner desiring his title confirmed "*may*" file his bill in the chancery court for that purpose, "and unknown and non-resident parties *may* be made defendants as they are made defendants to confirm tax-titles." The "decree shall be conclusive evidence of title as determined from the date of the decree *as against all parties defendant.*" (Emphasis ours.)

This language is so materially different from that of Section 1314 (2 Miss. Code 1942 Ann. p. 138) as to compel the conclusion that a different rule was intended, the judgment under the language of Section 1314 to "be held as conclusive evidence that the title

to said land was vested in the complainant *as against all persons claiming the same under the title existing prior for taxes.*" (Emphasis ours.)

The decisions of the Supreme Court of Mississippi support this construction. Thus, in *Wilson v. Foster Creek Lbr. & Mfg. Co.*, 134 Miss. 880, 99 So. 437, a proceeding was brought under Section 549, Code of 1906, Sec. 306, Hemmingway's Code (now the present Section 1323, above quoted) to confirm appellee's title to a tract of land. Appellants appeared and demurred, whereupon plaintiffs dismissed their suit as to them without prejudice. Judgment was thereupon rendered "*confirming appellees' title to the land involved as against all the defendants in the cause, known and unknown, naming the known defendants, except the names of appellants are not mentioned in the decree.*" (99 So. 437.) The appellants, conceiving that the judgment affected them, appealed; but the judgment was affirmed, the court holding that "*the final decree by necessary implication excluded appellants,*" and further denied appellants contention that in that character of proceeding none of the defendants could be dismissed, saying that:

> "That question is ruled by Smith v. Jassen, 105 Miss. 227, 62 So. 172. The court in that case held contrary to the contention of appellants." (99 So. 438.)

Of course, if such a suit could be dismissed as to some of the defendants, it could be dismissed as against all but one or two, and therefore necessarily is maintainable as against one or more, and no defendant not named in the judgment is affected by the decree.

It follows necessarily that the judgment below confirming appellee's title did not affect Calcote's royalty vendees injuriously, and such judgment, being separable from the suit of plaintiffs—a permissve, and not an involuntary or forced counterclaim—should have been affirmed.

But in all events petitioner was entitled to have the claim of the Calcotes cancelled as clouds upon its title under 2 Miss. Code 1942 Ann., Sec. 1324, p. 145. Such article reads:

> "Sec. 1324. REMOVING CLOUDS UPON TITLES.—When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

Petitioner sought the cancellation of the clouds cast upon its title to its oil and gas lease by the claim of the Calcotes (R. pp. 54-55) and the court adjudicated that it was entitled to the relief prayed for in such counterclaim (R. pp. 314-315), the confirmation of

title by the judgment of the trial court in effect granted this relief (R. pp. 314-315); and if for any reason the judgment was too broadly worded, it could have been corrected, without reversal.

Under the Mississippi statute for the cancellation of clouds (2 Miss. Code 1942 Ann., Sec. 1324, p. 145, above quoted), the Calcotes were certainly the only parties necessary to petitioner's counterclaim for such cancellation of clouds *(McLendon v. McGee,* ..... Miss. ....., 198 So. 725), and this also is the rule in the Federal Courts as well as generally *(Gridley v. Wynant,* 64 U. S. 500, 16 L. Ed. 411; *Goldsmith v. Gilliland,* 24 F. 154; *U. S. v. Oregon,* 295 U. S. 1, 24-25, 79 L. Ed. 1267, 1279). This relief was substantially what the judgment awarded petitioner; but if the judgment is too broad it could have been corrected, in accordance with applicable Mississippi authorities *(Stern v. Parker,* ..... Miss. ....., 25 So. 2d 787). The plaintiff in the *Stern* case sought to confirm a tax title under Section 1314, 2 Miss. Code 1942 Ann., providing for confirmation of such tax titles, but neither such section, nor Section 1315, 2 Miss. Code 1942 Ann., relating to confirmation of State land patents, was complied with as to process. Judgment of confirmation of title under the tax title and land patent statutes above mentioned was reversed but judgment cancelling the claims of appellant and other defendants as clouds on appellee's title was approved.

That petitioner's counterclaim was permissive under Subdivision (b) of Rule 13, and not compulsory under Subdivision (i) and under Rule 42(b), is apparent. Rule 13, Federal Rules of Civil Procedure,

Title 28, Sec. 723(c), U. S. C. A. p. 471; Rule 42(b), Federal Rules of Civil Procedure, Title 28, Sec. 723(c), p. 648; *Krentler-Arnold Hinge Last Co. v. Leman*, 13 F. 2d 796, 284 U. S. 448, 76 L. Ed. 389; *American Mills Co. v. Amercan Surety Co.*, 260 U. S. 360, 67 L. Ed. 306; *Big Cola Corp. v. World Bottling Co.* (CCA, DC), 134 F. 2d 741; *Lion Mfg. Corp. v. Chicago Flexible S. Co.* (CCA 7 Ill.), 106 F. 2d 930; *U. S. Industrial Chemicals v. Carbide & Chemicals Corp.* (DC NY), 52 Fed. Supp. 164; *Home Ins. Co. v. Trotter* (CCA 8 Mo.), 130 F. 2d 800; *Lesnik v. Public Industrial Corp.* (CCA 2 N.Y.), 144 F. 2d 968; Simpkins Federal Practice (Rev. Ed.), Sec. 708-714; pp. 669-672.

These rights conferred by the Mississippi statutes may be enforced by suit in the Federal Courts where the requisite jurisdictional amount is involved and there is diversity of citizenship between necessary parties. *(Rich v. Braxton*, 158 U. S. 375, 405, 39 L. Ed. 1022, 1032; *Pierce Pet. Corp. v. Empire G. & F. Co.* (CCA 5 Tex.), 17 F. 2d 758; *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196.)

SUMMARY

Summarizing our contentions briefly, they are:

1. The mineral lease involved was not void by reason of the failure of the petitioner to qualify before the lease was taken.

2. The lease being an executed contract, the lessor would have no right to object thereto—only the state could bring the lease in question and that by quo warranto proceedings.

3. By the acceptance of rentals covering a period of six years and executing warranty conveyances thereunder, wherein the mineral lease was referred to and confirmed, respondents (and the non-complaining owners of royalty thereunder as well) are estopped to question the same, and such constitutes a ratification of petitioner's oil and gas lease, binding on all.

4. The complaint as amended did not state a cause of action entitling the respondents to any relief whatsoever, and not being entitled to relief on the pleadings and proof are not entitled to a reversal, since under no circumstances could a decree be rendered in their favor.

5. The judgment below having resulted in a confirmation of the lease under which the absent (and non-complaining) royalty owners claim, their rights were not affected injuriously. At all events, their rights could have been preserved by a provision in the judgment.

6. Respondent had the right under Mississippi statutes to confirm its lease, and remove the Calcotes' claims as clouds on its title, without joining any other party. Such statutes should have been upheld, instead of disregarded, by the Honorable Fifth Circuit.

CONCLUSION

Petitioner earnestly urges that the majority of the Honorable Fifth Circuit Court of Appeals have held directly contrary to applicable decisions of this Court and other Circuits, as well as its own decisions, on

important questions of Federal practice; has disregarded the applicable statutes of Mississippi, and that writ of certiorari should be granted to review such decision; and it respectfully prays that upon such review the judgment of said Honorable Fifth Circuit be reversed and the trial court's judgment be affirmed, or that such other proceedings be had herein as may be in accordance with law.

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Appendix

IN THE
United States Circuit Court of Appeals
FOR THE FIFTH CIRCUIT

No. 11549

R. G. CALCOTE, ET AL.,
Appellants,

versus

TEXAS PACIFIC COAL & OIL COMPANY,
Appellee.

Appeal from the District Court of the United States for the Southern District of Mississippi.

(July 31, 1946.)

Before HUTCHESON, HOLMES, and LEE, Circuit Judges.

HOLMES, Circuit Judge: This action was brought by appellants to cancel a lease to explore for oil, gas, and other minerals. A counterclaim was filed by appellee (defendant and leaseholder) to declare and confirm its rights under the lease. The decisive question presented on this appeal is whether the lease, which was obtained by appellee while it was unlaw-

fully doing business in Mississippi as a foreign corporation, was ratified by the innocent party, or adopted by mutual consent, after the guilty party to the contract had become legally qualified to do business in the state.

The lease was executed on June 1, 1939. It was in standard form, and was to run for a primary term of ten years from date, conditioned upon the payments of annual delay-rentals, which were to be excused during the period of production. On January 2, 1940, the appellee qualified to do business in Mississippi. In May, 1940, 1941, 1942, 1943, and 1944, respectively, the appellee mailed to appellants checks for the annual delay-rentals of $60. These checks and the accompanying letters made specific references to the lease. The checks were endorsed and cashed; each time a receipt at the foot of the letter was signed by appellants.

The court below found that the lease was executed while the appellee, a foreign corporation, was engaged in business in Mississippi without having qualified to do so as required by the state statute.[1] The court held that the appellants ratified the lease by accepting the delay-rentals and disposing of the greater part of their royalty interests after the appellee had become legally qualified to do business in the state. The correctness of this ruling is questioned on appeal.

Appellants argue that under local law[2] the lease was

[1] Section 5343 of Miss. Code of 1942.

[2] The mineral lease covers land located in Mississippi; the contract was made in Mississippi; it was to be performed there; consequently its validity is governed by the laws of that state.

void when executed, and being void was not subject to ratification. Appellee contends that the lease was voidable, not void, and being voidable could be and was ratified. The primary question for decision on the merits is as to the validity of the lease. It appears that mineral interests in the land were conveyed, subject to the lease, by appellants to several grantees who were not made parties plaintiff or defendant.

On the threshold of this appeal is the decisive issue as to whether these royalty grantees were indispensable parties. According to the record, they acquired from the Calcotes an interest, not only in the royalties reserved by them as lessors in the lease to the appellee, but also in any other lease that might be executed by them covering the land in question. They are, therefore, interested in the prayer for the cancellation of the lease, since cancellation would destroy their royalties existing in *praesenti*, and the Calcotes might not see fit to make another mineral lease or to develop and operate the aforesad lands for minerals. On the other hand, while improbable, it may be to the advantage of the royalty grantees to have the lease confirmed. This is not a question of law but of fact, and there is no evidence in the record to give the answer to it, because the royalty grantees have not been made parties to this action. The fact that their interests may not have been prejudicially affected by the final judgment below, which was rendered after a trial on the merits, is not controlling, because the question of indispensable parties, and particularly of diversity jurisdiction, does not depend upon the result of the suit. The true test is the

situation that existed before and not after entry of the final judgment.

In diversity cases, the question of indispensable parties is inherent in the issue of federal jurisdiction, the determination of which should never await a decision on the merits if the complaint states a cause of action. Jurisdictional questions come first in the orderly disposition of a case. A precarious jurisdiction that limits the scope of judicial decision on the merits cannot be entertained. The same limitation would restrict review on appeal, even on *certiorari*, and no one could tell whether the court had jurisdiction until it had determined the merits of the controversy. The cases cited by appelee in its supplemental brief, to the effect that the judgment rendered would not interfere with any rights of the royalty owners, may be distinguished from the instant case because they have reference to rights that would continue to exist irrespective of the outcome of the suit.

It is argued that appellee has not raised the question, and that appellants may not now object, having brought the suit without joining indispensable parties as plaintiffs or defendants; but it was within the power of the court below to raise the issue of its own motion, since federal jurisdiction depended wholly upon diversity of citizenship and it was impossible to determine whether such diversity existed unless all indispensable parties were before the court and the citizenship of each was a matter of record. Section 50 of the Judicial Code[3] and rule 19(b) of the Federal Rules of Civil Pro-

[3] 28 U. S. C. A. 111.

cedure do not apply to indispensable parties, who must be made parties to the suit even though this will defeat federal jurisdiction.[4]

Subject to the provisions of rule 23 and subdivision (b) of rule 19, subdivision (a) of rule 19 provides that "persons having a joint interest" shall be made parties and be joined on the same side as plaintffs or defendants. If a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.[5] What then constitutes the joint interest of appellants and their royalty grantees?

By separate royalty deeds the Calcotes sold, granted, and conveyed unto one Stechol an undivided 1/16 interest, unto Smith an undivided 1/2 interest, and unto Wherritt an undivided 3/16 interest, in and to all the royalty, gas royalty, and royalty in casinghead gas, gasoline, and royalty in other minerals in and under, and that may be produced and mined from, the following described lands (describing them), together with the right of ingress and egress at all times for the purpose of mining, drilling, and exploring said lands for oil, gas, and other minerals, and removing the same therefrom. These grants ran for 20 years and as long thereafter as oil, gas, or other minerals, were produced in paying quantities. Each grant provided:

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[4] Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Kendig v. Dean, 97 U. S. 423, 24 L. Ed. 1061; Gregory v. Stetson, 133 U. S. 579, 10 S. Ct. 422, 33 L. Ed. 792; New Orleans Waterworks v. New Orleans, 164 U. S. 471, 17 S. Ct. 161, 41 L. Ed. 518; Niles-Bement Company v. Iron Moulders Union, 254 U. S. 77; United Shoe Machinery Co. v. U. S., 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708; Commonwealth Fruit Co. v. Smith, 266 U. S. 152.

[5] Rule 19(a) of Federal Rules of Civil Procedure.

> "Said land, or portions thereof, being now under oil and gas lease executed in favor of The Texas Pacific Coal and Oil Company it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-half [one-sixteenth, or three sixteenths, respectively,] of all the oil royalty, and gas royalty, and casinghead gas and gasoline royalty, and royalty from other minerals or products, due and to be paid under the terms of said lease."

Under these deeds the grantees acquired the right to participate in the royalties under the present lease and under all future leases. Their right is restricted to a portion of the minerals produced, with no right to join in future leases or to receive any part of the bonus or delay-rentals. Their interest is a perpetual non-participating fractional royalty in the oil, gas, or other minerals, that may be produced from said lands.[6]

Doubtless all will admit that the Calcotes have only an undivided one-fourth of one-eighth royalty in the minerals so long as the present lease is in force and effect. It is a fractional mineral interest in the whole tract, distinct from their contingent reversionary interest.[7] It would not be possible to cancel this lease without destroying the undivided three-fourths royalty interest therein owned by the above named individuals who have not been made parties to this suit. Therefore no decree can be entered in this case in accordance with the prayer of the complaint without annulling the vest-

[6] Armstrong v. Bell, 24 So. (2), 10, 12, ... Miss. ..... Cf. Schlittler v. Smith, 101 S. W. (2) 543.

[7] Koenig v. Calcote, 25 So. (2) 763. Cf. Keegan v. Humble Oil & Refining Co., ... F. (2) .....

ed rights of absent parties whose presence might deprive the court of jurisdiction. The leasing contract was an entirety, and from its nature could not be cancelled as to the Calcotes and allowed to stand as to the other royalty owners. The lessors and their grantees were, technically and beneficially, joint owners of a common property, each with an undivided interest in every particle of the minerals. None of them owned a single molecule in severalty. The relation of the royalty grantees to the controversy over the validity of this lease was so direct and vital that no adequate judgment could be entered without affecting their interests. If it had been cancelled as to the Calcotes, it would have been cancelled as to their grantees, because a royalty interest under an invalid lease is a nullity. Since it was confirmed as to the Calcotes, it stands confirmed as to the grantees in practical effect, as only the lessee can explore the lands for minerals during the term of the lease. We are unable to say that the royalty grantees were not injuriously affected by confirmation of the lease. They were entitled to be heard on the subject. Their presence was absolutely, not conditionally, necessary.[8] No court can directly adjudicate upon a

[8] Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Williams v. Bankhead, 19 Wall. 563, 22 L. Ed. 184; Central R. of N. J. v. Mills, 113 U. S. 249, 5 S. Ct. 456, 28 L. Ed. 949; Wilson v. Oswego Tp., 151 U. S. 56, 14 S. Ct. 259, 38 L. Ed. 70; Massachusetts & Southern Const. Co. v. Cane Creek Tp., 155 U. S. 283, 15 S. Ct. 91, 39 L. Ed. 152; California v. Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683; State of Texas v. Interstate Commerce Commission, 258 U. S. 158, 42 S. Ct. 261, 66 L. Ed. 531; Baltimore & O. R. Co. v. City of Parkersburg, 268 U. S. 35, 45 S. Ct. 382, 69 L. Ed. 834; Moore's Federal Practice, Vol. 2, pp. 2144-2159.

In Shields v. Barrow, supra, the court said, p. 140: "A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the

person's rights without such person being actually or constructively before it.[9]

The counterclaim, whether federal jurisdiction of it be ancillary or independent, must fail for the same reasons. It would be hard to find a better illustration of indispensable parties than is afforded by the instant case. * * * It is not the reversionary interest in the land, but the leasehold, that is the subject matter of this suit. It is the estate held by virtue of the lease that is sought to be destroyed by cancellation of the lease, and the grantees' interest in that estate is three times as great as appellants'. The leasehold estate is a determinable fee distinct from the reversionary interest in the land, and the right to receive royalty payments is a distinguishable legal interest,[10] which was reserved by appellants out of the leasehold estate; but a royalty may also be created prior to any lease.[11]

By separate royalty deeds, as we have seen, the Calcotes sold and conveyed unto their said several grantees not only an undivided interest in the royalty carved out of the present lease but also in a royalty to

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contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties."

Barney v. Baltimore City, 6 Wall. 280, where part owners or tenants in common of real estate were held to be indispensable parties to a partition suit. To the same effect, see Torrence v. Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L. Ed. 528.

In Roos v. Texas Co., 23 F. (2) 171, cert. den., 277 U. S. 587, the court said, p. 172: "Rescission of a contract, or declaration of its invalidity, as to some of the parties, but not as to others, is not generally permitted." Citing among others, the following from the Fifth Circuit: Vincent Oil Co. v. Gulf Refining Co., 195 Fed. 434.

9 Mallow v. Hinde, 12 Wheat. 193, 198, 6 L. Ed. 599.

10 Koenig v. Calcote, 25 S. (2) 763, 765.

11 Armstrong v. Bell, 24 So. (2) 10, 12.

be carved out of all future mineral leases as well as out of any mineral production by the owners. Whatever estate in the minerals was acquired by virtue of the present lease vested in *praesenti.*[12] The right to receive a portion of the minerals produced under the lease was also a vested interest in *praesenti* distinct from the royalty created prior to future leases and future production. The absent royalty owners not only have a distinguishable legal interest in *praesenti* but a distinct vested interest in *futuro;* and there can be no enjoyment of the latter estate until the termination of the former. The cancellation of the present lease would destroy their vested interest in *praesenti,* whereas a declaration of its validity would either destroy absolutely their vested interest in *futuro* or postpone the enjoyment of it indefinitely. Vested interests of absent parties, therefore, will be directly and vitally affected regardless of the outcome of this litigation.

This case is to be distinguished from one where the plaintiff has wholly failed to state a cause of action. If, as a matter of law, a cause of action is not stated on the face of the complaint, an inquiry as to the absence of indispensable parties is unnecessary or, to use the words of the Supreme Court, wholly gratuitous. In *Bourdieu v. Pacific Oil Co.*, 299 U. S. 65, where the bill entirely failed to state any cause of action and the rights of absent parties were in no way threatened, the court held that it would be a waste of time to consider the question of indispensable parties, and dismissed the bill on the merits; but the court specifically stated that such inquiry would have been entirely

[12] Lloyd's Estate v. Mullen, etc., Co., 4 So. (2) 282, 288.

proper under a good bill. This decision merely applied the maxim that the law does not require any one to do vain or useless things.[13] Moreover, a federal question was presented as an integral part of the case, and the court's jurisdiction was unfettered except by general principles of law and equity.[14]

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[13] Lex neminem cogit ad vana seu inutilia peragenda. 5 Co. 21, Wharton's Legal Maxims, p. 252, No. 368.

[14] Sneed v. Phillips Petroleum Co., 76 F. (2) 785, wherein the dissenting judge wrote the opinion of the court as well as his own, is an authority by this court that cannot be ignored. There federal jurisdiction depended solely upon diversity of citizenship. It was a suit by one of the owners of gas in a common pool to restrain the taking of gas therefrom for wasteful uses. The court held that the lessor of the defendant and the cotenant of the plaintiff were indispensable parties. Equity to prevent a multiplicity of suits was not invoked; but injunctive relief against a continuing wrong was sought to restrain the defendant from flowing its wells except to utilize the gas for light or fuel. The action was based solely upon the conservation laws of Texas, and neither the validity of the lease nor the construction thereof was involved.

The plaintiff alleged that the lessee was doing an illegal act, committing a tort, which was causing him irreparable damage. It did not appear(1) that the lease provided for the taking of gas for the uses mentioned, or for any particular use or purpose. The issue was not what the lease authorized the lessee to do but what the laws of Texas prohibited any owner or lessee from doing. No vested right under the lease was threatened; the attack was upon the asserted right of any proprietor under the general law to take gas for wasteful uses or for any use other than light or fuel. The lessor of the defendant and the cotenant of the plaintiff, as well as all others similarly situated, were interested in this issue, though they would not be bound by the decision; but one is not an indispensable party merely because questions of law and fact in which one is interested will necessarily be adjudicated in a pending suit, and become a legal precedent in future cases.(2)

The principle of the maxim, sic utere tuo ut alienum non laedas, applies to the public, and to public rights, as well as to individuals and to individual rights; and it applies in such manner as that when any such right is violated, whereby damage is sustained, a right of action accrues.(3) As to the natural resources of a state, the title to which has become vested in private persons, the maxim may be extended by general law so as to provide that you shall so use your own property as not to injure your neighbor's or to waste your own. The maxim in its ancient form may be illustrated by the obstruction or diversion on your own land of water that has been accustomed to flow, and ought to flow, on to your neighbor's land; also by the maintenance of a nuisance on one's premises that infects the air or corrupts the waters of one's neighbor.

Where the lessee is committing the nuisance or other tort, he is liable to be sued, and a court of equity will interfere by injunction to prevent a continuance of such acts. A lessee who drills or operates gas wells on leased premises in violation of the conservation laws of a state, thereby wrongfully causing injury to his neighbor's property, is not

In the instant case, where the complaint states a cause of action and federal jurisdiction depends wholly upon diversity of citizenship, there can be no dispensing with an inquiry as to the absence of indispensable parties. The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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only liable in damages for the injury done but may be enjoined from a continuation of such wrongful conduct.

This analysis of the Sneed case deals only with the holding of the court that the lessor of the defendant and the cotenant of the plaintiff were indispensable parties to a suit to restrain the lessee from an alleged violation of the general law of Texas, which was causing continuous damage to the plaintiff.

Authorities collated in Sneed v. Phillips Pet. Co., 76 F. (2) at 789, are cited to sustain the contention that the failure to join indispensable parties is not jurisdictional. Turning to said page 789, we find that these authorities are collated in the dissenting opinion, and that one of them is Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289, wherein a tenant in common was permitted to sue in equity to obtain a conveyance of land without making his cotenants parties to the suit. In the discussion of the point, the court did not use the words necessary or indispensable parties; but, since the presence of the absent cotenants was dispensed with, it follows that they were held to be not indispensable parties. Another decision cited at page 789 was General Investment Co. v. N. Y. Central Railroad Co., 271 U. S. 228, 46 S. Ct. 496, 70 L. Ed. 920. In this case jurisdiction did not depend solely upon diversity of citizenship. On the contrary, the court expressly held that the suit was essentially one arising under the laws of the United States. The only other decision among the authorities collated on this point, at page 789, was Pennsylvania v. West Virginia, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117, 32 A. L. R. 300. This was a suit by sovereign states to enjoin the state of West Virginia from enforcing an act of its legislature. Of such a controversy the Supreme Court had exclusive original jurisdiction, and the decision is not applicable to a question relating to the diversity jurisdiction of the federal district courts.

In Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77, 41 S. Ct. 39, 61 L. Ed. 145, the court held that federal jurisdiction depended upon, and was defeated by, the decision that the subsidiary corporation was an indispensable party to the suit, and should be realigned as a party plaintiff. Therefore, the question of indispensable parties was necessarily held to be jurisdictional in that case. See also note 11, p. 2146, of Moore's Federal Practice, wherein the author says that the principle of the Bourdieu case, indiscriminately applied, would be dangerous. In the Bourdieu case, as above noted, federal jurisdiction did not depend solely upon diversity of citizenship.

Briefly to notice the other decisions cited to sustain the theory that the question of indispensable parties is not jurisdictional. Sun Insurance Co. v. Scott, 284 U. S. 177, 46 F. (2) 10: Actions for money judgments by an insured against several fire insurance companies. A mortgagee of an insured was not an indispensable party, because his interest was not

necessarily affected, and the court could frame its judgment so as to protect the mortgagee's interest in the policies. If the insurance companies had been suing to cancel the policies, which they were not, we would have had a case more like the one at bar.

In Seeley v. Cornell, 74 F. (2) 353, the court announced the general rule, and held that the absent parties were not indispensable, saying that it was within the power of a court of equity to deprive a party of the benefit of a deed or judgment obtained by fraud without setting it aside. The appellate court differed from the district court in that the latter "thought a decision required the setting aside of deeds," p. 356. See opinion of the learned district judge, 6 F. Supp. 241.

In Seeley v. Cornell, 90 F. (2) 562, we find nothing to sustain the theory that the question of indispensable parties is not jurisdictional in diversity cases.

In Spring v. Ohio Oil Co., 108 F. (2) 560, the absent parties were held to be not indispensable, since no relief was sought against them and a decree could be framed to protect them. Seeley v. Hunt, 109 F. (2) 595, is not at all applicable. The point we are considering was not even discussed, it being the third appeal of another case abstracted in this note. On a prior appeal the court had ordered a full and complete accounting.

State of Washington v. United States, 87 Fed. (2) 421, also cited in the dissenting opinion, was a suit by the United States against certain parties, alleging that they had trespassed upon Sand Island, and would continue to do so unless enjoined. The Court held that the State of Washington was an indispensable party, but said that the absence of such party was not jurisdictional. It was not jurisdictional because there the suit was brought by the United States, and the federal district court had original jurisdiction without regard to the citizenship of the parties. 28 U. S. C. A. 41, subd. (1). It is only where jurisdiction depends solely upon diversity of citizenship that the absence of indispensable parties absolutely defeats federal jurisdiction. In analyzing federal decisions, we must keep this distinction constantly in mind to avoid being confused by them. This is also true in considering the decisions of state courts on the subject of indispensable parties.

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(1) De non apparentibus et non existentibus eadem est ratio. 5 Co. 6. Of things which do not appear, and things which do not exist, the rule in legal proceedings is the same. Wharton's Legal Maxims, p. 73.

(2) Oxley v. Sweetland, 94 F. (2) 33.

(3) Wharton's Legal Maxims, p. 195.

HUTCHESON, Circuit Judge: Dissenting:

The principles governing the determination of whether parties are indispensable or merely necessary are apparently simple and constant. In applying them, however, in individual cases, the decisions have made, and are making, it increasingly difficult for courts to say categorically and with the voice of authority who are and who are not indispensable parties.[1] It might be supposed then that in the general confusion I should regard myself as without sure guide and compass and as compelled, therefore, to concur in, rather than dissent from, the considered judgment of my associates, that Calcote's royalty grantees were indispensable parties whose absence requires a reversal of the cause. But my concession that the decisions have caused confusion has not gone so far as to admit that the fog is impenetrable. Certainly I have not admitted that I see the question this record presents as "through a glass darkly" and not face to face. On the contrary, I think I see it and its answer quite clearly, and, because I do, I feel obligated not only to dissent from an opinion which I regard as adding to the confusion but to give my reasons quite simply and briefly for doing so.

It is undeniable that the statements in *Shields v. Barrow*, 17th Howard, 130, which are so often quoted with assurance as authority for opinions which answer the same questions on the same state of facts in wholly different ways, are rather dogmatic in nature. But it is equally undeniable that "there is no prescribed formula for determining in every case whether a person

[1] Cf. Moore's Federal Practice, Chapter 19, pp. 2133-62.

or corporation is an indispensable party or not," *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77. The truth of the matter is that the classification of parties as necessary or indispensable depends entirely upon the particular facts of each case and that the same facts should produce the same holding. Further, though some of the decisions exhibit more than a little confusion about it, it is undeniable that the error in non-joinder of parties, either necessary or indispensable, is not jurisdictional.[2] Finally, it is clearly settled that even if a party is indispensable, his absence from a suit will not be ground for dismissing it or reversing a judgment in it, if it clearly appears that no relief can be, or has been, obtained in the suit which injuriously affects his inteeest.[3] In this case the plaintiffs have elected, as I think they had a right to do, to sue without joining their mineral vendees, and the defendant, having the same right, has elected to maintain its cross action without joining them. The judgment below went in favor of the continuance of the lease whose cancellation was sought in plaintiffs' suit and whose confirmation and affirmance was sought in defendant's cross bill. Neither plaintiffs-appellants, nor cross-plaintiff-appellee are here complaining of the absence of parties. This court of its own motion raises and presses the point that the mineral grantees were indispensable parties, contrary, I think, to the settled jurisprudence of this Circuit[4] and elsewhere.[5] Thus the

[2] Sneed v. Phillips Pet. Co., 76 F. (2) at 789 and authorities collated. State of Washington v. United States, 87 F. (2) at 427.
[3] Sneed v. Phillips Pet. Co., supra; Bourdieu v. Pac. Oil Co., 299 U. S. at pp. 70-71.
[4] Spring v. Ohio Oil Co., 108 F. (2) 560; Seeley v. Cornell, 74 F. (2) 353; id., 90 F. (2) 562; Seeley v. Hunt, 109 F. (2) 594.
[5] Home Ins. Co. v. Scott, 46 F. (2) 10—284 U. S. 177.

majority in reversing the judgment on the ground that the mineral grantees were indispensable and their absence requires a reversal holds, and in effect declares, that though the original parties to the lease were satisfied below to try out between themselves the issues arising on the lease and are satisfied here to try out whether the judgment was right on the merits and should be affirmed or was wrong on the merits and should be reversed for a new trial, they may not do so. It seems clear to me that this view is untenable. I think that the mineral vendees are not indispensable parties and that since their joinder was neither sought by appellants or appellee nor required by the court, the judgment ought not to be reversed merely because they were not made parties. But if they could be regarded as indispensable parties to the suit as originally filed, it is quite plain, I think, that the failure to make them parties was not an error for which the suit should be reversed. The attack upon the lease failed. The judgment confirmed instead of cancelling it. It, therefore, did not and could not possibly affect the rights of the mineral grantees who claim under the lease. In this situation, it seems to me a vain thing to reverse for the absence of parties a judgment whose rights it does not adversely affect. I respectfully DISSENT.

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 11549

R. G. CALCOTE, ET AL.,
Appellants,

versus

TEXAS PACIFIC COAL & OIL COMPANY,
Appellee.

Appeal from the District Court of the United States for the Southern District of Mississippi.

ON PETITION FOR A REHEARING

(September 10, 1946.)

Before HUTCHESON, HOLMES, and LEE, Circuit Judges.

HOLMES, Circuit Judge: The question of indispensable parties is primarily a matter of equity jurisprudence,[1] sometimes of due process of law; but the

[1] The duty of the court to raise the question of its own motion is well settled. In Hoe v. Wilson, 9 Wall. 501, in delivering the opinion of the court, Mr. Justice Swayne said, pp. 503-504: "But Zephania Jones, the complainant in the suit in which the decree of sale was made, and the other heirs-at-law of Ann R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules

bringing in of such parties may present a federal jurisdictional question if federal jurisdiction depends wholly upon diversity of citizenship. Therefore, we said that the question of indispensable parties was inherent in the issue of federal jurisdiction.

In the absence of parties and without their having an opportunity to be heard, a court is without jurisdiction to make an adjudication concerning them;[2] but where the controversy may be determined without prejudice to the rights of absent parties who are beyond its jurisdiction, it will be done; and a court of equity will strain hard to reach that result. It was so held in *Bordieu v. Pacific Oil Co.*, 299 U. S. 65, 81 L. Ed. 42, but there the court had jurisdiction on the ground of a federal question, and from a federal jurisdictional standpoint it was immaterial whether the absent party was brought in or not.

In the Bordieu case, *supra*, the Supreme Court was referring to a necessary party that could not be brought before it, and there is nothing in its opinion

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of equity jurisprudence the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, *sua sponte*, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. This was manifest error."

The reason for the application of the rule in this case is that while the district court had potential jurisdiction to cancel or confirm the lease, it did not have complete active jurisdiction to do either in the absence of indispensable parties. Therefore, in raising the question of its own motion, this court was merely looking into its own active jurisdicton to do full and complete justice in the matter before it. We found that both the district court and this court, though possessing complete potential jurisdiction to grant adequate relief, failed to acquire active jurisdiction of the royalty grantees, or of their interest in the res against which this proceeding was directed. As to the absent parties, this proceeding is as truly coram non judice as if potential jurisdiction were lacking.

[2] New Orleans Waterworks v. New Orleans, 164 U. S. 471, 480.

to indicate that a court of equity should strain hard to determine the merits of a cause in the absence of one who is within its jurisdiction and can be made a party to the suit. While the court said that it would be a waste of time to enter upon a consideration of the indispensability of the presence of the United States (which was the absent party), it later expressly held that the United States was "not an indispensable party," since a mere inspection of the bill at once disclosed that it stated no cause of action against any one.

In the instant case the situation is entirely different. There was no reason for a court of equity to strain to find a way to adjudicate the merits of a controversy in the absence of interested parties beyond its jurisdiction, because here, for aught that appears, the presence of the royalty grantees was readily obtainable. Aside from these considerations, every indispensable party must be brought into court, actually or constructively, or the suit will be dismissed if a substantial claim is stated in the complaint.[3] It is axiomatic that indispensable parties cannot be dispensed with in diversity cases even though their presence will defeat federal jurisdiction.

In the Bordieu case the rights of the United States were in no way threatened; it had no interest requiring protection in a proceeding that at the threshold was seen to be without substance; and the court held that it was not an indispensable party to the particular suit, without expressing an opinion as to what its status

[3] Barney v. Baltimore City, 6 Wall. 280, 284, 285, 18 L. Ed. 825; Donovan v. Campion, 85 Fed. 71, 72. See also Dobie on Federal Procedure p. 218, which says: "There can be no dispensing with indispensable parties."

would be "upon a good bill.". If we apply to the case before us the test thus laid down, we find that the rights of the royalty grantees were directly threatened in the suit to cancel the lease, and that they were directly affected in the judgment confirming it. The validity of the lease was the paramount issue on the hearing below, both as to the original bill and as to the counterclaim. The confirmation of its validity in the judgment under review directly affected vested rights of the royalty grantees without giving them an opportunity to be heard.

Except where the court had jurisdiction without regard to diversity of citizenship, we have been cited to no decision of the Supreme Court or of this court, and we have found none, where an inquiry as to the presence of indispensable parties was dispensed with on the ground that no cause of action was stated in the complaint. In *Sneed v. Phillips Petroleum Co.*, 76 F. (2) 785, where jurisdiction rested solely on the ground of diversity of citizenship, this court expressly refused to proceed until certain persons whose presence it held to be indispensable were made parties. Notwithstanding the contention there that no cause of action was stated, this court held that a substantial claim was presented in the complaint, and remanded the cause with directions to bring in the absent parties.

The maxim that the law never requires the doing of an idle thing cannot be invoked in diversity cases to avoid an inquiry as to the indispensability of parties where a substantial claim is made in the complaint. The original bill in this case sought cancellation of

the same lease that the counterclaim sought to confirm.[4] The judgment appealed from not only dismissed the original bill, but granted the relief prayed for in the counterclaim.

In the majority opinion we pointed out that these royalty grantees had separate and distinct vested mineral interests, which would necessarily be prejudicially affected by confirmation as well as by cancellation of the lease. To say that it is useless to inquire into the question of indispensable parties in diversity cases, where a substantial claim is stated in the complaint, is almost the same as saying that it is a waste of time for the court to look into its own jurisdiction. In *Mallow v. Hinde*, 12 Wheat. 193, 198, 6 L. Ed. 599, the court indicated that it might put its decision upon lack of jurisdiction or upon a much broader ground. It said:

> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's rights, without the party being either actually or constructively before the court."

Since neither of the judges who concurred in the decision in this case is of the opinion that the petition for rehearing should be granted, the petition is denied.

HUTCHESON, Circuit Judge, Dissents.

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[4] Additional parties may be brought in under the counterclaim or cross-claim. Rule 13(h) of Federal Rules of Civil Procedure.

1 Miss. Code Ann. 1942, Sec. 1120, p. 1025:

"QUO WARRANTO

"*To what cases applicable*—The remedy by information in the nature of a quo warranto shall lie, in the name of the state, against any person or corporation offending in the following cases, viz.:

"FIRST—Whenever any person unlawfully holds or exercises the functions of any public office, civil or military, or franchise, or any office in any corporation, city, town, or village, and to try the right to any such office.

"SECOND—Whenever any public officer has done or suffered to be done, or has omitted to do any act, the doing or omission of which works a forfeiture of office.

"THIRD—Whenever any two or more persons shall act as a corporation, or assume so to do without being legally incorporated.

"FOURTH—Whenever any corporation shall be guilty of a misuser or abuse of its powers, or ceases to discharge the duty for which it was created.

"FIFTH—Whenever any corporation wilfully exercises powers not conferred by law.

"SIXTH—Whenever any corporation fails to exercise powers conferred by law and essential to its corporate existence, or implied in its duty to the public.

"SEVENTH—Whenever any corporation shall be guilty of doing or neglecting to do any act the doing

or neglecting of which is made by law a cause of forfeiture of franchise.

"EIGHTH—Whenever any corporation shall willfully and persistently violate the law made for regulating such corporations, or the criminal law; but acts done in good faith before adjudication of the constitutionality of a doubtful statute shall not be cause of forfeiture.

"NINTH—Whenever it is sought to have the right of any corporation, not created by the laws of this state, to do business in this state forfeited because of its persistent refusal to comply with the laws thereof.

"TENTH—Whenever any non-resident alien or corporation shall acquire or hold lands contrary to law."